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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOHN W. HECHINGER, *et al.*,
Petitioners,

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, *et al.*,
Respondents,

UNITED STATES OF AMERICA,
Intervenor.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1991, this Court held unconstitutional the veto power of the Board of Review (the "Board of Review" or the "Board") of the Metropolitan Washington Airports Authority (the "Airports Authority" or the "Authority") in *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252 (1991) ("*CAAN*"). Later that year, Congress amended the Metropolitan Washington Airports Act of 1986 (the "Transfer Act") to alter substantially the Board's powers and composition. Despite Congress' actions to remedy the constitutional deficiencies in the original Act identified by this Court, and the Authority's adoption of those changes, the district court held, and the court below affirmed, that the new Board of Review continues to violate separation of powers principles and is unconstitutional. Therefore, the questions presented are:

1. Whether Congress may set forth statutory procedures that require (as a condition of the lease of federal property) that a non-federal Authority defer the effective date of action on certain decisions for a prescribed period of time to allow a supposed agent of Congress the opportunity to render advice to the Authority, and, if such advice is not followed, to allow Congress a prescribed period of time in which to decide whether to overrule such decision by joint resolution strictly in accordance with the Bicameralism and Presentment Clauses.

2. Whether the decision of the court below holding that an agent of Congress may not render advice in ways that could affect the timing of decisionmaking by a non-legislative entity, even if that congressional agent does not have ultimate control over the actions of that entity, conflicts with the separation of powers jurisprudence articulated by this Court in *Alaska Airlines v. Brock*, 480 U.S. 678 (1987), by the United States Court of Appeals for the Ninth Circuit in *Lear Siegler, Inc. Energy Prods. Div.*

v. Lehman, 842 F.2d 1102 (9th Cir. 1988), *irrelevant portion withdrawn en banc*, 893 F.2d 205 (9th Cir. 1989), and by the United States Court of Appeals for the Third Circuit in *Ameron, Inc. v. United States Army Corps of Eng'rs*, 809 F.2d 979 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1988).

3. Where Congress prescribes qualifications relating to residence, airport use and aviation expertise for the appointment of members of a Board of Review established by a non-federal airports authority to represent the interests of nationwide airport users, whether such Board of Review becomes an agent of Congress for separation of powers purposes merely because such members are appointed by the Airports Authority from non-exhaustive lists supplied by the Speaker of the House and the President *pro tempore* of the Senate and may, but need not, be Members of Congress, even though such Board members are removable only by the Airports Authority.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the District of Columbia Circuit were John W. Hechinger, Craig H. Baab, and Citizens for the Abatement of Aircraft Noise, Inc. (as plaintiffs-appellees); Metropolitan Washington Airports Authority and its Board of Review (as defendants-appellants); and the United States of America (as intervenor for appellees).

Petitioners before this Court are Metropolitan Washington Airports Authority and its Board of Review. The Metropolitan Washington Airports Authority is a non-federal public body corporate and politic created by the Commonwealth of Virginia and the District of Columbia with no parent company or subsidiary. Respondents are John W. Hechinger, Craig H. Baab, and Citizens for the Abatement of Aircraft Noise, Inc.

The United States of America exercised its statutory right to intervene in the court of appeals pursuant to 28 U.S.C. § 2403(a) (1988) because the constitutionality of an Act of Congress had been challenged.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

The Metropolitan Washington Airports Authority and its Board of Review hereby respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals affirming the district court is not yet reported but is reprinted at Appendix ("App.") 1a.[1] The opinion of the district court is reported at 845 F. Supp. 902 (D.D.C. 1994) and is reprinted at App. 22a.

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[1] Page citations to material printed in the Appendix appear as "—a."

JURISDICTION

The opinion and judgment of the district court were entered on January 31, 1994 and were stayed by the respective orders of the district court on February 15, 1994, App. at 35a, the court of appeals on April 11, 1994, App. at 39a, and the court of appeals on October 24, 1994. App. at 20a. The opinion and judgment of the court of appeals were entered on September 27, 1994. App. at 1a. The effective date of the judgment, opinion, and mandate was stayed by order of the court of appeals entered on October 24, 1994. App. at 20a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes are reproduced in the statutory appendix:

U.S. CONSTITUTION, art. I, §§ 1, 6, cl. 2, 7, cl. 2, 7, cl. 3; art. II, §§ 1, 2, cl. 2; art. IV, § 3, cl. 2.

Metropolitan Washington Airports Act of 1986, as amended by the Metropolitan Washington Airports Act Amendments of 1991, 49 U.S.C. app. §§ 2451-2461 (1988 and Supp. 1994).

Metropolitan Washington Airports Act Amendments of 1991, 105 Stat. 2197 §§ 7001-7004 ("1991 Amendments").

Metropolitan Washington Airports Act of 1986, Pub. L. No. 99-500, 100 Stat. 1783-373 (1986) *reenacted in* Pub. L. No. 99-591, 100 Stat. 3341-376 (1986) ("Unamended Act").

1985 Va. Acts ch. 598, as amended by 1987 Va. Acts ch. 665.

District of Columbia Regional Airports Authority Act of 1985, D.C. Act 6-90, 32 D.C. Reg. 6093 (1985).

District of Columbia Regional Airports Authority Act of 1985 Amendments Act of 1987, D.C. Act 7-32, 34 D.C. Reg. 3804 (1987).

STATEMENT OF THE CASE

A. Proceedings Below

This controversy originated with a challenge by Respondents to the constitutionality of § 2456(f)(4) of the Metropolitan Washington Airports Act of 1986, Pub. L. No. 99-500, 100 Stat. 1783-373 (1986), *reenacted in* Pub. L. No. 99-591, 100 Stat. 3341-376 (1986) ("Transfer Act"). In 1991 this Court held that the original § 2456(f)(4) was unconstitutional to the extent that it allowed the Board of Review of the Metropolitan Washington Airports Authority, a non-federal entity, to veto actions of the Authority. *Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252 (1991) ("*CAAN*"). Responding to this Court's concerns, Congress enacted a new § 2456(f)(4). *See* Metropolitan Washington Airports Act Amendments of 1991, Pub. L. No. 102-240, Title VII, 105 Stat. 2197 (1991) ("1991 Amendments") (codified at 49 U.S.C. app. §§ 2451-2461 (1988 and Supp. 1994)).[2] The Airports Authority then reconstituted the Board of Review in accordance with the amended provision. Both the amended statute and the Authority's new Bylaws (i) strip the Board of Review of all veto power; (ii) explicitly vest appointment and removal power in the Board of

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[2] Except where specific reference to the unamended 1986 Act or the 1991 Amendments is intended, all citations in this brief to the Transfer Act (as amended) are to the U.S. Code. Pursuant to Pub. L. No. 103-272 (July 5, 1994), most laws relating to transportation formerly codified in 49 U.S.C. app. have been recodified elsewhere. The Metropolitan Washington Airports Act of 1986 as amended was not recodified and remains in force as it appears in the former codification. *See* H.R. REP. No. 180, 103d Cong., 1st Sess. 644 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 1461. For clarity, citations herein are to the old codification, which sets forth the entire Act as amended.

Directors of the Authority; (iii) eliminate any requirement that Members of Congress serve on the Board of Review; and (iv) ensure that any congressional action taken involving the Airports Authority complies fully with separation of powers principles and the Bicameralism and Presentment Clauses. *See* Bylaws of the Metropolitan Washington Airports Authority (March 4, 1987), as amended (January 8, 1992 and April 1, 1992) ("Bylaws"), art. IV (App. at 200a).

Respondents then filed a new challenge to the constitutionality of amended § 2456(f)(4) in the United States District Court for the District of Columbia. On cross motions for summary judgment, the district court held that, even as amended, § 2456(f)(4) violates the Constitution. *Hechinger v. Metropolitan Washington Airports Auth.*, 845 F. Supp. 902 (D.D.C. 1994) (App. at 22a), as amended, 845 F. Supp. at 909 (App. at 35a).[3] Specifically, the district court held that Congress continues to have "considerable control" over the Board of Review and that the Board exercises "significant [federal] executive powers," thereby violating separation of powers principles and the Appointments Clause. 845 F. Supp. at 909.

On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the judgment of the district court as to the separation of powers issues only. The court of appeals held that (1) the requirement that the appointment of qualified members be made from non-exhaustive lists supplied by the Speaker of the House and President *pro tempore* of the Senate, coupled with the fact that Members of Congress, together with non-Members, sit on the Board, render it an agent of Congress, and (2) the ability of the Board of Review to in-

[3] The district court's modification of its Opinion and Order granted a seventy-five day stay of the effective date of the decision. *See Hechinger v. Metropolitan Washington Airports Auth.*, 845 F. Supp. 902, 911 (D.D.C. 1994).

fluence the timing of Authority decisions that are subject by statute to a fixed two-tiered report-and-wait period violates separation of powers principles. *Hechinger v. Metropolitan Washington Airports Auth.*, No. 94-7036, slip op. at 18 (D.C. Cir. September 27, 1994). On October 24, 1994, the court of appeals granted the motion of the Authority and its Board of Review to stay the court of appeals' mandate and the effective date of the district court's judgment, in part to allow the Authority and its Board of Review to petition this Court for a writ of certiorari. *See Hechinger v. Metropiltan Washington Airports Auth.*, No. 94-7036 (D.C. Cir. Oct. 24, 1994) (order staying issuance of mandate and staying effective date of opinion and order of district court).

B. Statement of Facts

Pursuant to the recommendation of an advisory Commission, the Virginia Assembly enacted legislation authorizing the creation of an authority to acquire Washington National Airport and Washington Dulles International Airport (collectively, the "Washington Airports" or "Airports") by lease from the federal government. *See* 1985 Va. Acts ch. 598. The Council of the District of Columbia passed a substantially identical law. *See* District of Columbia Regional Airports Authority Act of 1985, D.C. Act 6-90, 32 D.C. Reg. 6093 (1985). The reciprocal Virginia and D.C. statutes constituted an interstate compact, creating the regional Airports Authority as a "public body corporate and politic," "independent" of all state and federal governmental bodies. *See* 1985 Va. Acts ch. 598, § 2; D.C. Act 6-90, § 3; Transfer Act § 6007 (b)(1). The two jurisdictions also agreed to consent, subject to gubernatorial and mayoral approval, to lease conditions to be set forth by Congress "that are not inconsistent with [the Virginia or District] Act." *See* 1985 Va. Acts ch. 598, § 3; D.C. Act 6-90, § 4.[4]

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[4] The Virginia and D.C. statutes provided that the Authority was to consist of 11 members, five of whom are appointed by the Governor of Virginia, three by the Mayor of the District of Columbia,

Congress then enacted the 1986 Transfer Act to authorize the Secretary of Transportation to lease the Airports to the independent regional Airports Authority. To ensure that the Authority had the input of a national-user perspective, the Transfer Act provided that the Secretary of Transportation should negotiate lease provisions for a Board of Review designed to achieve this goal. A lease was subsequently negotiated and signed by the Secretary of Transportation and the Chairman of the Airports Authority and approved by the Governor of Virginia and the Mayor of the District of Columbia. *See* Lease of the Metropolitan Washington Airports (Mar. 2, 1987) ("Lease") (App. at 173a), as amended on Dec. 30, 1991 ("First Amendment to Lease") (App. at 197a). The original Lease, following the provisions of the 1986 Transfer Act, provided for a Board of Review consisting of nine Members of Congress, eight of whom were to be members of four specific congressional committees. Lease at 13 (App. at 185a). If the Authority wished to take certain major actions (listed in old § 2456(f)(4)(B) of the 1986 Transfer Act), it was required to submit the proposed action to its Board of Review for a period of 30 days (60 days in the case of the Authority's budget). *Id.* at 13.D. (App. at 186a). The original Board of Review had the power to veto such proposed actions. *Id.* at 19 (App. at 187a).

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two by the Governor of Maryland, and one by the President of the United States. *See* 1985 Va. Acts ch. 598, § 4(A); D.C. Act 6-90, § 5(A), 32 D.C. Reg. 6093 (1985); Bylaws, art. IV, § 1.a (App. at 115a; 148a; 203a-204a). To ensure a truly local Board of Directors, the Virginia and D.C. statutes further required that all members, with the exception of the presidential appointee, reside within the Washington metropolitan area. *See* 1985 Va. Acts ch. 598, 4(B); D.C. Act 6-90, § 5(B); Bylaws, art. I, § 1.b. (App. at 115a; 148a; 200a); S. REP. No. 193, 99th Cong., 1st Sess. 12-13 (1985). By amendments, the Virginia and D.C. legislatures provided for the creation of the Board of Review by the Authority. *See* 1987 Va. Acts ch. 665, § 5(A)(5); D.C. Act 7-32, § 3(C)(2) (1987); Bylaws, art. IV (App. at 136a; 168a; 203a). Its powers and authority were prescribed by the Authority in its Bylaws. App. at 200a.

On June 17, 1991, this Court, in *CAAN*, struck down the old Board of Review's veto power as unconstitutional. Thereafter Congress held legislative hearings, during which it considered the views of local residents and nationwide users of the Washington Airports as well as the views of constitutional law experts.[5] *See Amendments to the Metropolitan Washington Airports Authority Act of 1986: Hearing Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 102d Cong., 1st Sess. 102-30 (1991). On December 18, 1991, Congress amended the Transfer Act, *see* Metropolitan Washington Airports Act Amendments of 1991, Pub. L. No. 102-240, 105 Stat. 2197 (Dec. 18, 1991) (codified at 49 U.S.C. app. §§ 2451-2461 (1988 and Supp. 1994)) ("1991 Amendments"), to provide for a new Board of Review that would reflect the needed perspective of frequent airport users in a way that satisfied the concerns expressed by this Court in *CAAN*. *See* 1991 Amendments § 7004(a); 49 U.S.C. app. § 2456(f)(1). As Representative Hammerschmidt, Ranking Minority Member of the House Committee on Public Works and Transportation, explained:

> [T]his bill creates an *advisory* board of review composed of frequent airport users who are experts in aviation matters. This board, which could still include Congressmen, would *monitor* the actions of the airports and could *recommend* changes to the airport authority. If the airports do not agree with one of these recommendations, the matter could be brought before Congress under expedited procedures. The Congress could then exercise its constitutional

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[5] Members of the Subcommittee on Aviation of the House Committee on Public Works and Transportation heard testimony regarding several proposed amendments to the Transfer Act of 1986. The proposed amendments were discussed on the floors of both the House and Senate. *See* 137 CONG. REC. H10344-51 (daily ed. Nov. 18, 1991); 137 CONG. REC. H11508-09 (daily ed. Nov. 2, 1991); 137 CONG. REC. S18578-80, S18606-07 (daily ed. Nov. 27, 1991).

> responsibility to pass legislation blocking the offending action of the airport.

137 CONG. REC. H10347 (daily ed. Nov. 18, 1991) (emphasis added). This new Board of Review was an "oversight mechanism" to accommodate the interests of nationwide users.

> Others, such as airlines, airport employees, and anti-noise activists, have groups to represent their interests. But *airport users* have no such organization. Therefore, we need a board of review to fill that important role.

Id. at H10346 (statement of Rep. Hammerschmidt) (emphasis added).

After this Court's separation of powers concerns were addressed in the 1991 Amendments, the Lease was amended to provide for a new Board of Review, and the amended Lease was approved by Virginia and the District of Columbia. *See* First Amendment to Lease (App. at 197a). The Authority amended its Bylaws setting up its new Board of Review and prescribing its composition, authority, and powers. App. at 197a. Among the specific changes were:

1. ***Creation of New Advisory Board.***

The central flaw identified by this Court in *CAAN* was "the threat of the veto," which "[hung] over the Board of Directors like the sword over Damocles, creating a 'here-and-now subservience' to the Board of Review sufficient to raise constitutional questions." *CAAN*, 501 U.S. at 265 n.13 (citation omitted). The 1991 Amendments completely eliminated the veto as a condition of the federal lease. The Authority's new Board of Review is now an advisory body only, with the limited power to make recommendations to the Board of Directors with respect

to certain major decisions.[6] *See* 49 U.S.C. app. § 2456 (f)(4); Bylaws, art. IV (App. at 97a; 203a-204a).

After the Directors transmit a matter to the Board of Review, the Board of Review may issue a recommendation concerning the proposed action within 30 calendar days or 10 legislative days, whichever is longer.[7] If no recommendation is timely made, or if, even earlier, the Board of Review affirmatively indicates that it intends to make no recommendation, the Directors' proposed action may take effect immediately. *See* 1991 Amendments § 7002(d)(2)(C); 49 U.S.C. app. § 2456(f)(4)(C); Bylaws, art. IV, § 7 (App. at 72a; 97a; 205a). If the Board of Review makes a recommendation, the Directors may adopt it, and the proposed action also takes effect immediately. *See* 1991 Amendments § 7002(d)(2)(D)(i); 49 U.S.C. app. § 2456(f)(4)(D)(i); Bylaws, art. IV, § 8 (App. at 72a; 99a; 206a).

Alternatively, even if the Review Board and Directors disagree, the Board of Directors may proceed with any

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[6] In the 1991 legislation, Congress supplemented the list of specific actions which are to be transmitted to the Board of Review. The list now includes (i) the adoption of an annual budget and any amendments thereto; (ii) the authorization for the issuance of bonds and an annual plan for the issuance of bonds and any amendments to such plan; (iii) the adoption, amendment or repeal of a regulation; (iv) the adoption or revision of a master plan; (v) the appointment of the chief executive officer; (vi) the award of a contract which has been approved by the Board of Directors; (vii) any action by the Board of Directors approving a terminal design or airport layout or modification of such decision or layout; and (viii) the authorization for the acquisition or disposal of land and the grant of a long-term easement. 1991 Amendments § 7002(d)(1); 49 U.S.C. § 2456(f)(4)(B); Bylaws, art. IV, § 4 (App. at 71a; 97a; 204a).

[7] "Legislative days" are defined here as days excluding weekends, holidays, and any day on which neither House of Congress is in session because of an adjournment *sine die*, a recess of more than three days, or an adjournment of more than three days. 49 U.S.C. app. § 2456(f)(4)(C).

proposed action so long as the Directors provide in writing to the Board of Review and Congress (i) a description of the proposed action, (ii) the Board of Review's evaluation, and (iii) the Board of Directors' response, and Congress does not enact legislation within a 60-legislative-day report-and-wait period, triggered by the Directors' response. *See* 1991 Amendments § 7002 (d)(2)(D)(ii); 49 U.S.C. app. § 2456(f)(4)(D)(ii); Bylaws, art. IV, § 9 (App. at 72a-73a; 99a; 206a). Of course, if Congress passes a joint resolution within that period disapproving the proposed action and if the resolution is enacted into law in accordance with Article I, § 7, then the Directors' proposed action will not take effect. *See* 1991 Amendments § 7002(e)(5)(A-G); 49 U.S.C. app. § 2456(f)(5)(A-G) (App. at 73a; 100a). Thus, all decisionmaking authority now resides solely in the Board of Directors, subject only to a validly enacted federal statute that can trump a proposed action by the Board of Directors.

2. Strengthening of the Appointment and Removal Powers of the Non-Federal Authority's Directors.

This Court found it "[m]ost significant" that "membership on the [old] Board of Review is limited to federal officials, specifically members of congressional committees charged with authority over air transportation." *CAAN*, 501 U.S. at 266-67. It further noted that although the appointments must be made from the lists of nominees " 'provided by the Speaker of the House . . . or the President *pro tempore* of the Senate' . . . there is no requirement that the lists contain more recommendations than the number of Board openings." *Id.* at 268 (citation omitted). Also troubling was that the "Transfer Act imposes no requirement that the Members of Congress who are appointed to the Board actually be users of the airports." *Id.* at 267. Finally, this Court was persuaded that under the original Transfer Act, "[c]ontrol over committee assignments . . . gives Congress effective removal

power over Board [of Review] members. . ." *CAAN*, 501 U.S. at 269.

The 1991 Amendments cured these concerns. *See* 1991 Amendments § 7002(a)(1); 49 U.S.C. app. § 2456 (f)(1); Bylaws, art. IV, § 1 (App. at 69a; 95a; 203a). Membership on the Board of Review is no longer limited to specific committee members, or even to Members of Congress. It is now open to all individuals (except those residing in the local area) with experience in aviation matters and in addressing the needs of airport users. *See* 1991 Amendments § 7002(b)(2)(C); 49 U.S.C. app. § 2456(f)(2)(C); *see also* Bylaws, art. IV, § 2 (App. at 70a; 96a; 204a). In addition, appointees now must be "frequent users" of the Airports. *See* 1991 Amendments § 7002(b)(2)(C); 49 U.S.C. app. § 2456 (f)(2)(C); Bylaws, art. IV, § 2 (App. at 70a; 96a; 204a).[8] While the Authority's Directors still choose the members of the Board of Review from lists provided by the Speaker of the House and the President *pro tempore* of the Senate, the 1991 Amendments expressly and unconditionally permit the Directors to request additional recommendations if they are not completely satisfied with the names submitted. *See* 1991 Amendments § 7002 (a)(1); 49 U.S.C. app. § 2456(f)(1); Bylaws, art. IV, § 1.d (App. at 69a; 95a; 204a). Finally, the removal power is exclusively in the Authority, not in Congress: the 1991 Amendments expressly authorize the Authority to remove a member of the Board of Review for cause by a two-thirds vote of the Board of Directors. *See* 1991 Amendments § 7002(f)(11); 49 U.S.C. app. § 2456 (f)(11); Bylaws, art. IV, § 4 (App. at 78a; 105a; 204a).

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[8] In accordance with the new lease terms, the Board of Directors of the Airports Authority terminated the old Board of Review, issued new Bylaws and appointed a new Board of Review. Today, four of the nine members of the Board of Review are not Members of Congress.

REASONS FOR GRANTING THE WRIT

I. EVEN THOUGH CONGRESS FOLLOWED THIS COURT'S CONSTITUTIONAL GUIDANCE IN AMENDING THE TRANSFER ACT, THE AMENDED ACT WAS STRUCK DOWN ON NEW GROUNDS THAT REACH BEYOND THIS COURT'S PRECEDENTS.

This Court consistently grants its writ of certiorari in cases where a lower court has held an Act of Congress unconstitutional. *See FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993) ("Because the Court of Appeals held an Act of Congress unconstitutional, we granted certiorari"); *United States v. Gainey*, 380 U.S. 63, 65 (1965) ("We granted certiorari . . . to review the exercise of the grave power of annulling an Act of Congress"). In large part, this is because of the strong presumption of constitutionality accorded to Acts of Congress. *See Bowen v. Kendrick*, 483 U.S. 1304 (1987) (Rehnquist, C.J. in chambers) (" 'Given the presumption of constitutionality granted to all Acts of Congress,' it is . . . likely that the Court will note probable jurisdiction here . . ."), *quoting Schweiker v. McClure*, 452 U.S. 1301, 1303 (1981) (Rehnquist, J. in chambers). This presumption is especially strong when Congress has specifically considered the question of an Act's constitutionality. *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981).

Here, Congress held extensive hearings, including testimony from constitutional law experts, to determine how best to satisfy the constitutional problems identified by this Court in *CAAN*. *See Amendments to the Metropolitan Washington Airports Authority Act of 1986: Hearing Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation* (102-30), 102d Cong., 1st Sess. 138-49 (1991) (testimony of Johnny H. Killian, Senior Specialist, American Constitutional Law, Congressional Research Service, and Jessica Korn, Special Guest, Governmental Studies Program,

Brookings Institution). Congress then amended the Board of Review provisions of the Transfer Act to respond to each of the points raised by this Court. Congress eliminated this Court's central concern with the original Transfer Act—namely the veto power—a concern firmly rooted in *INS v. Chadha*, 462 U.S. 919 (1983). *Hechinger*, slip op. at 2; App. at 2a. In its place a two-tiered report-and-wait provision was enacted, also based on longstanding precedents of this Court upholding comparable statutes. *See, e.g., Alaska Airlines v. Brock*, 480 U.S. 678 (1987).[9] In addition, responding directly to language in *CAAN*, Congress both *eliminated* the requirement that Board members be Members of Congress and *added* the requirement that Board members be "frequent users" of the airports. *See* 49 U.S.C. app. § 2456 (f)(2)(C). Finally, the 1991 Amendments clearly vest the power both to appoint and to remove Board members in the Airports Authority.

The court below acknowledged that Congress had eliminated the provisions deemed constitutionally offensive in *CANN*. *Hechinger*, slip op. at 1, 3; App. at 2a, 3a. It nonetheless reached beyond the precedents of this Court to invalidate the 1991 Amendments because, in its view, they impose "*other*" qualifications on Board membership and create "*other* powers" that cause the new advisory Board to "continue to offend the Constitution." *Id.* at 1 (emphasis added); App. at 2a. To the contrary, the 1991 Amendments were drafted according to blueprints supplied by this Court. Indeed, the history of the 1991 Amendments presents a "paradigm of a Congress aware of constitutional constraints on its power and carefully seeking to act within those limitations." *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 482 n.47 (1977). Certainly, if all Acts of Congress are entitled to a pre-

[9] The constitutionality of this report-and-wait period is discussed in Section II, below.

sumption of constitutionality, and if that presumption is stronger when Congress has considered constitutional questions associated with a statute, then a decision by a lower court to strke down statutory amendments crafted by Congress with the express purpose of curing constitutional infirmities previously identified by this Court warrants review on a writ of certiorari.

II. THE DECISION BELOW THAT AGENTS OF CONGRESS MAY NOT RENDER ADVICE IN WAYS THAT COULD AFFECT MERELY THE TIMING OF EXECUTIVE DECISIONMAKING CONFLICTS WITH THE SEPARATION OF POWERS DECISIONS OF THIS COURT IN *ALASKA AIRLINES* AND OF THE NINTH AND THIRD CIRCUITS.

The court below concluded that the new Board of Review, in its view still an agent of Congress, retains control over the Authority's actions in violation of separation of powers principles. While the court pointed to several factors that enabled the Board of Review to influence the Directors' decisionmaking responsibilities, *see Hechinger,* slip op. at 9-16, App. at 10a-19a, what "tip[ped] the balance" and amounted to impermissible "leverage" was the Board of Review's power to issue recommendations, which could affect whether proposed Authority actions take place immediately or are referred to Congress for a "report-and-wait" period. *See id.* at 12, 16; App. at 12a, 17a. The court of appeals essentially held that advice or influence (caused merely by delay) flowing from one branch of government to another, even in the absence of ultimate authority to coerce compliance, violates separation of powers principles. Even assuming *arguendo* that the Board of Review is an agent of Congress, which petitioners strenuously dispute, *see* Section III, *infra,* petitioners respectfully submit that the court of appeals' holding conflicts with the decisions of this Court and other federal circuits and, indeed, contravenes the original intent of the Framers with respect to separation of powers.

The distinction between "control" and "advice" or "influence" was recognized by Madison in his treatment

of separation of powers in the Federalist Papers. As the court of appeals noted, Madison cautioned against the "encroachment" of legislative power against the coordinate branches of government. *See Hechinger*, slip op. at 15 (citation omitted); App. at 16a. But Madison also stated that separation of powers "does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other." *See* THE FEDERALIST No. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961). On the contrary, the Framers regarded the principle of separation of powers as allowing for advice and consultation between coordinate branches of government. *See* THE FEDERALIST No. 47, at 302 (James Madison) (Clinton Rossiter ed., 1961) (citing the British practice of allowing judges to attend and participate in deliberations of Parliament without allowing them to vote, in support of the idea that some participation by members of one branch in activities of another does not necessarily threaten virtues associated with separation of powers). The holding of the court below thus runs contrary to the Framers' more flexible view.

Decisions of this Court reflect the historical distinction between control on the one hand and advice and influence on the other, holding that Congress or its agents may properly attempt to advise and influence the Executive branch, but may not ultimately control Executive branch decisions without conforming to the Bicameralism and Presentment Clauses of Article I, § 7. In *Bowsher v. Synar*, this Court struck down certain provisions of the Gramm-Rudman-Hollings Act giving the Comptroller General—an admitted agent of Congress—"the *ultimate authority*" to determine budget cuts and thus depriving the President of any discretion in carrying out this inherently federal executive task. *See Bowsher*, 478 U.S. 714, 732-33 (1986) (emphasis added). In contrast, this Court has consistently upheld statutory requirements that agency actions be submitted to a committee of Congress for a report-and-wait period prior to taking effect, recog-

nizing that "[t]his interval gives Congress an opportunity to review the regulations and *either to attempt to influence the agency's decision*, or to enact legislation preventing the regulations from taking effect." *Alaska Airlines v. Brock*, 480 U.S. 678, 690 (1987) (emphasis added); *see also Dalton v. Specter*, 114 S. Ct. 1719 (1994) (upholding constitutionality of statute which requires base closure commission to submit recommendations to House and Senate Armed Services Committees for a report-and-wait period prior to closing bases); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 7-8 (1941) (upholding six-month report-and-wait period). This control/influence dichotomy is particularly clear in *INS v. Chadha*, where this Court held unconstitutional a one-house veto provision in the Immigration and Nationality Act which allowed a single house of Congress to *veto* decisions by the Attorney General to cancel deportation actions, *Chadha*, 462 U.S. 919, 923 (1983), yet supported the constitutionality of a report-and-wait period during which proposed actions of the Attorney General could be stayed, reviewed and, if necessary, reversed through legislation. *Id.* at 935 n.9.

In *CAAN* itself, this Court struck down the veto provision of the original Transfer Act on the ground that Congress may not retain "control, outside the ordinary legislative process," of governmental entities it has created by statute. *CAAN*, 501 U.S. at 277. The Court in *CAAN* further held that Congress is constrained by the Article I requirements of bicameralism and presentment only when it "makes *binding* policy" or "act[s] with *conclusive* effect." *Id.* at 274 n.19 (emphasis added). This Court has never held that the Constitution forbids agents of Congress from advising or even influencing agency decisions where ultimate decisionmaking authority rests either with the agency or with Congress acting in its constitutionally prescribed legislative capacity. The idea that mere "advice" or "influence" by agents of Congress could constitute a violation of separation of powers principles is an inappropriate extension of an invention of

the D.C. Circuit in an earlier decision upon which the court below relied. *See Hechinger*, slip op. at 10-11, App. at 11a-12a, *citing Federal Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993), *cert. granted*, 114 S. Ct. 2703 (1994) (*"FEC v. NRA"*). Such reasoning is not to be found in this Court's decision in *CAAN*.

In *FEC v. NRA*, which is currently pending before this Court, the D.C. Circuit invalidated a Federal Election Commission ("FEC") enforcement action against the NRA Political Victory Fund because the FEC Act provided for the participation of the Secretary of the Senate and Clerk of the House as *ex-officio* (non-voting) members of the commission. These employees, appointed and removable by Congress at will, were able to participate and represent the interests of Congress in the sensitive deliberations of a bipartisan agency concerning campaign finance and enforcement, issues that often involve congressional elections or even specific Members of Congress. Whatever the outcome of *FEC v. NRA*, the nature of congressional participation in federal executive decision-making implicated by the circumstances of that case bears no resemblance to the functions of a separate advisory board of frequent airport users to a non-federal Authority, which appoints and removes those board members.

In holding that separation of powers principles preclude an agent of Congress from exerting influence that may affect the timing of an agency's actions, even though such agent cannot determine the result, the decision of the court below directly conflicts with the decisions of other circuit courts that have considered a substantially identical question. Both the Ninth and Third Circuits have upheld a "two-tiered" report-and-wait provision in the Competition in Contracting Act ("CICA") under which the Comptroller General is vested with authority to impose waiting periods of varying lengths on agency procurement decisions prior to referring such decisions to Congress. *See Lear Siegler, Inc. Energy Prods. Div. v.*

Lehman, 842 F.2d 1102 (9th Cir. 1988), *irrelevant portion withdrawn en banc*, 893 F.2d 205 (9th Cir. 1989); *Ameron, Inc. v. United States Army Corps of Eng'rs*, 809 F.2d 979 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1988). Pursuant to CICA, the Comptroller General (clearly a congressional agent, *see Bowsher*, 478 U.S. at 732) has the authority to stay any government contracting proceeding in which a bid protest has been filed. *See Ameron*, 809 F.2d at 983-86 & n.5. The Comptroller General then has 90 working days to file a report containing his recommendations with the procuring executive branch agency. The procuring agency is not bound to accept the recommendations of the Comptroller General, just as in the present case the Authority need not accept the Board of Review's recommendation. But if the procuring agency does not accept the recommendation, the Comptroller General must file a written report with Congress explaining why the procuring agency did not accept the recommendation.

The key to the Third Circuit's holding in *Ameron* was that CICA "do[es] not *compel* procuring agencies to obey the recommendation of the Comptroller General," *id.* at 986 (emphasis added), even though the authority of the Comptroller General to file a report with Congress is a "persuasive mechanism" through which Congress may *influence* the procurement process and "compel the executive to listen" to the Comptroller General's opinions. *Id.* The Ninth Circuit in *Lear Siegler* relied upon the same compulsion/influence distinction in upholding the constitutionality of CICA. The Ninth Circuit held that the constitutionally relevant issue is whether an agent of Congress "control[s]" or retains "ultimate authority" over the administrative agency, as opposed to whether it merely "affects[s]" the agency. *Lear Siegler*, 842 F.2d at 1108. In fact, that court explicitly ruled that a legislative device allowing an agent of Congress time to influence (but not control) Executive branch agencies is constitutionally permissible. *Id.* at 1109 ("[A] report-and-wait provision

is proper even if the time is used by congressional committee members to pressure an executive official to alter a . . . decision"), *citing City of Alexandria v. United States*, 737 F.2d 1022, 1026 (Fed. Cir. 1984).[10]

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[10] The present case is even more compelling on this point than *Lear Siegler* or *Ameron*, because here the entity with whose power the Board of Review supposedly interferes is not the coordinate, co-equal Executive Branch of the federal government. The Authority is "an independent local agency," 49 U.S.C. app. § 2451(4), which is "created by the Commonwealth of Virginia and the District of Columbia . . ." 49 U.S.C. app. § 2453(2). Moreover, the Board of Review was not imposed directly on the Authority by federal statute; rather, it was created by an interstate compact, pursuant to the laws of Virginia and the District of Columbia, to satisfy a condition of the federal lease of the Airports. Thus, acceptance of the Board of Review and its advice was the voluntary act of a non-federal agency.

Until *CAAN*, this Court had never applied separation of powers principles to invalidate interference by a branch of the federal government with a branch of a *state or local* government or other non-federal agency. In *CAAN*, the exercise of a veto by specific Members of Congress may have seemed so transparent an aggrandizement of congressional power (such as that struck down by *Chadha*) that the issue of interference with a coordinate, co-equal branch (until then a linchpin of separation of powers analysis) was not addressed. Here, however, the issue is squarely presented: whether there can be a violation of federal separation of powers where there is no indication of any interference with a coordinate, co-equal branch of the federal government. *See Mistretta v. United States*, 488 U.S. 361, 381-82 (no encroachment on coordinate branch); *Bowsher v. Synar*, 478 U.S. 714, 727 ("usurpation of [federal] Executive Branch functions" by congressional agent); *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977) ("preventing the Executive Branch from accomplishing its constitutionally assigned functions"). Even *Springer v. Government of the Philippine Islands*, 277 U.S. 189 (1928) involved the intrusion by one branch of a federal territorial government into the affairs of a coordinate, co-equal federal territorial branch. By contrast, even this Court's opinion in *CAAN* reads the relevant constitutional history as suggesting that a Member of Congress may hold a state office so long as "concurrent federal office is [not] a *prerequisite*" for holding the putatively state office. *CAAN*, 501 U.S. at 270 n.16 (emphasis added), *citing* 1 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, pp. 20-21, 217, 386, 389, 428-

The court below attempted to distinguish *Lear Siegler* and *Ameron* on two grounds: (1) that the Board of Review's authority is significantly greater than that of the Comptroller General, who can initiate a waiting period under CICA only when a third party files a complaint, *Hechinger*, slip op. at 14, App. at 14a; and (2) that under CICA the executive agency may override the Comptroller General's stay on a showing of urgent or compelling circumstances. *Id.*; App. at 14a-15a. The first distinction is constitutionally irrelevant because the scope of a congressional agent's constitutional authority to act is simply not dependent upon whether the act is self-initiated or whether it is in response to the request of a private citizen. Moreover, the Board of Review cannot freely target or randomly choose matters for the report-and-wait period. The 1991 Amendments (as incorporated in the Bylaws) specify precisely the areas subject to review and recommendation. As to the second distinction, the Transfer Act provides safeguards just as does CICA with respect to matters of an urgent or compelling nature. Since under the Act only certain enumerated matters are submitted to the Board, the Airports Authority remains free to act in areas related to the daily operation of the airports. *See* 49 U.S.C. app. § 2456(f)(4)(B); *see also* § 2456(f)(4)(E) (Authority permitted to service debt and to obligate and expend funds for previously authorized capital expenditures and routine operating expenses even if there is no approved budget). Thus, any differences between this case and the CICA report-and-wait provision upheld in *Lear Siegler* and *Ameron* are constitutionally insignificant.

The decisions of this Court in *CAAN* and *Alaska Airlines*, as well as the decisions of the Third Circuit in *Ameron* and the Ninth Circuit in *Lear Siegler*, represent the controlling view that the principle of separation of powers is flexible enough "to accommodate the practical

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429 (1911). As indicated in Section III, *infra*, membership in Congress is no longer a prerequisite for membership on the Board of Review.

exigencies of an emerging nation" by allowing interaction between branches of government under certain circumstances. *See* STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY at 35 (3d ed. 1992). The court below has adopted the position that an agent of Congress may not play even an informational or advisory role in the decisionmaking process of an executive body. *Hechinger*, slip op. at 14-15; App. at 15a-16a. This Court has never held that such an impenetrable wall must be erected between the branches of the federal government. To the contrary, in today's widely perceived atmosphere of gridlock, it appears that the founding fathers showed remarkable foresight in framing a Constitution that "anticipates that the coordinate Branches will converse with each other on matters of vital common interest." *Mistretta v. United States*, 488 U.S. 361, 408 (1989) (upholding "statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment"). The failure of the court below to recognize the constitutional distinction between control and mere advice or influence, so persuasively established by the intent of the Framers and the decisions of this Court and other federal circuits, warrants review by this Court.

III. IN HOLDING THAT THE BOARD OF REVIEW IS A CONGRESSIONAL AGENT THE COURT BELOW MISCONSTRUED SEPARATION OF POWERS DOCTRINE WITH RESPECT TO (1) CONGRESS' POWER TO PRESCRIBE QUALIFICATIONS AND PROCEDURES FOR APPOINTMENT, (2) THE SIGNIFICANCE OF THE AUTHORITY'S EXPRESS REMOVAL POWER, AND (3) THE AUTHORITY'S APPOINTMENT OF SITTING MEMBERS OF CONGRESS TO A NON-FEDERAL BOARD.

The court of appeals held that notwithstanding the amended statute's revised criteria for membership and revised appointment and removal procedures, the Board of Review still constitutes an agent of Congress. *See*

Hechinger, slip op. at 9; App. at 10a. In doing so, the court below relied upon three constitutionally flawed rationales which, given their potentially sweeping implications, warrant review by this Court. First, the court of appeals concluded that the Board is a congressional agent because Congress prescribed statutory qualifications and procedures for the appointment of its members. The court reasoned that congressionally mandated qualifications relating to residence, airport use and expertise qualified a number of sitting Members of Congress, *see id.* at 8-9, and that appointment by the Authority from lists provided by the Speaker of the House and the President *pro tempore* of the Senate was tantamount to appointment of such members by Congress (even though the Authority is free to reject names on the lists and without any limitation to request additional names, *see id.*, and non-Members of Congress are surely eligible and have been appointed). Second, the court below undervalued the critical importance of the Authority's removal power in determining whether the Board of Review is an agent of Congress under this Court's separation of powers jurisprudence. *See id.* Third, the court below found the Board to be a congressional agent because five of nine members currently serve in Congress. *See id.* Each of these rationales either contradicts or is in tension with fundamental teachings of this Court.

Far from excluding Congress from the appointment process, the Constitution grants to the Senate the power to confirm the appointments of officers of the United States. U.S. CONST. art. II, § 2, cl. 2. This Court has also held that Congress has the power to set qualifications for all offices created by statute. *See Crenshaw v. United States,* 134 U.S. 99, 105-06 (1890). Congress exercised that power here in defining qualifications and setting forth procedures for the Authority to appoint members of the Board of Review. In condemning this congressional involvement in the appointment of Board of Review members, the court below unjustifiably cir-

cumscribed Congress' role in creating offices and delineating the universe of persons qualified to fill them.[11]

The 1991 Amendments set three neutral qualifications for membership on the Board of Review—all of which support the goal of ensuring that the Board will protect the interests of nationwide users of the airports. The first criterion, that members not reside in Maryland, Virginia, or the District of Columbia, simply ensures that the Board will reflect national rather than local interests.[12] The second qualification, that members have experience in aviation matters, imposes the unremarkable requirement that Board members possess knowledge of the relevant subject area. The third qualification, that Board members be frequent users of the airports, was specifically suggested by this Court in *CAAN* as a way of ensuring

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[11] The court below did not hold that the qualifications requirements and appointment procedures violated the Appointments Clause, but only that they indicated that the Board of Review was an agent of Congress for separation of powers purposes, *see Hechinger*, slip op. at 9; App. at 9a-10a; the district court held that the analysis in either case "should [not] be any different." 845 F. Supp. at 909; App. at 33a.

[12] The interests of local residents are already represented by the Board of Directors of the Authority itself since 10 of the 11 Directors must reside within the Washington Standard Metropolitan Statistical Area. This requirement, first enacted by Virginia and the District of Columbia in chartering the Authority, may explain why Congress proposed that a mechanism to provide for consideration of the views of nationwide users should become a condition of the federal lease. *See* 49 U.S.C. app. § 2456(e)(1) and (2).

The importance to Congress of ensuring a nationwide user perspective is evidenced by the amended Transfer Act's retention of the so-called "drop-dead" clause, which prevents the Authority from taking certain actions in the event a judicial order renders the Board of Review unable to carry out its functions. 49 U.S.C. app. § 2456(f)(6). While the court below held, without citation or analysis, that the presence of the "drop-dead" clause is evidence that the Board of Review is an agent of Congress, the clause is more properly regarded as nothing more than an ordinary nonseverability provision demonstrating Congress' intent that a guaranteed nationwide user perspective be included in the Lease.

that Board members actually have a user perspective on the airports. *See CAAN*, 501 U.S. at 267.

Under the rubric of "look[ing] beyond explicit terms" of a facially valid statute, the court below held that since "as a practical matter, relatively few individuals other than members or alumni" of transportation-related congressional committees will be able to meet the statutory criteria for Board membership, the statute even as amended fails to satisfy the concerns previously expressed by this Court. *See Hechinger*, slip op. at 8; App. at 8a. In fact, four current Board members are not Members of Congress. While three of these are former Members of Congress, the court of appeals gave no principled reason why the presence of congressional "alumni" should raise constitutional concerns. Moreover, the court below was clearly wrong in underestimating the number of potentially qualified persons who live outside the region, frequently use the airports, and are knowledgeable about aviation matters, *e.g.*, state officials, association and aviation industry representatives, academics, former federal employees and many others.

This Court also has upheld the use of lists as a constitutionally permissible method for Congress to participate in the appointment process. *See Mistretta v. United States*, 488 U.S. 361 (1989) (upholding Congress' power to require the President to appoint three federal judges to the United States Sentencing Commission, having considered a list of six judges recommended by the Judicial Conference of the United States); *Bowsher*, 478 U.S. at 727-28 (this Court did not dispute a statutory requirement that the Comptroller General be appointed by the President from a list of three candidates submitted by the Speaker of the House and the President *pro tempore* of the Senate); *see also Myers v. United States*, 272 U.S. 52, 128-29 (1926).[13] What troubled this Court in *CAAN*

[13] The principle behind these cases is simple: Congress can prescribe procedures and qualifications for appointment to office, including the requirement of a nominating list created by agents of Congress, as long as these qualifications do not amount to a "legis-

was that under the unamended Transfer Act, appointments were made from lists of *only* Members of Congress, with no requirement that the lists contain more recommendations than the number of Board openings. *CAAN*, 501 U.S. at 268. *CAAN* noted that "[t]he list system, *combined* with congressional authority over committee assignments, guarantees Congress effective control over appointments." *Id.* at 269 (emphasis added).

The 1991 Amendments removed any requirement that members of the Board of Review sit on particular committees, or, indeed, even be Members of Congress. As for the lists themselves, the amended Transfer Act ensures the Authority's appointment discretion by expressly authorizing it to request additional names if it is not satisfied with the names on the lists. *See* 49 U.S.C. app. § 2456(f)(1). But the court below dismissed the significance of the Authority's power to request additional names, asserting

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lative designation" of the appointee. *See Myers*, 272 U.S. at 128-29. As one district court synthesized the rule, the appointment power is confined by such limitations as the authority creating the office sees fit to impose as long as such limitations are not a legislative designation of the appointee: "In general, Congress, pursuant to its power to create inferior federal offices, has the power to prescribe reasonable qualifications for office; while the President, pursuant to his constitutional power of appointment, has the authority to select for appointment *from among those designated by Congress as qualified.*" *Mow Sun Wong v. Hampton*, 435 F. Supp. 37, 41 n.6 (N.D. Cal. 1977), *aff'd*, 626 F.2d 739 (9th Cir. 1980), *citing Myers*, 272 U.S. 52, 128-29 (emphasis added); *see also* 29 Op. Att'y Gen. 254, 256 (1911) ("Congress may point out the general class of individuals from which an appointment must be made, if made at all, but it can not control the President's discretion to the extent of compelling him to commission a designated individual."). Moreover, the findings of the court below on this issue were in conflict with the circuit's decision in *FEC v. NRA*, where the court rejected as nonjusticiable a separation of powers challenge to the statutory qualifications for FEC appointment because only the appointing power would know whether it was constrained by the statutory limitations. 6 F.3d 821 (D.C. Cir. 1993) (citing numerous authorities for the proposition that an appointing power may view statutory restrictions as not legally binding).

that "we have little doubt who would win a test of wills." *Hechinger*, slip op. at 9; App. at 9a. This view ignores the fact that this Court in *Bowsher* upheld a statute with an identical non-exhaustive list provision. *See generally Bowsher*, 478 U.S. 714 (1986) (construing 31 U.S.C. § 703 which provides, *inter alia*, that, in appointing a Comptroller General from a congressionally prescribed list, "[t]he President may ask the commission [of Members of Congress] to recommend additional individuals," 31 U.S.C. § 703(a)(3) (1988)).[14] More troubling, the court of appeals' willingness to construe the amended Transfer Act in the way most likely to raise constitutional doubt violates the canon, long applied by this Court, of construing statutes to avoid constitutional problems where possible. *See, e.g., NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *Kent v. Dulles*, 357 U.S. 116 (1958); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). A plainer reading of the statute, that at the Authority's request Congress *will provide* additional names, would comport better with this Court's long-followed canons of statutory construction and would render illusory the concerns of the court below.

In reaching the conclusion that the Board of Review is an agent of Congress, the court of appeals' decision also ignores the fundamental principle that the power of *removal* represents the dispositive factor in defining the character of an agency. *See Myers*, 272 U.S. at 134 (traditional executive office characterized by authority of President to "remove [the officer] without delay"); *Hum-*

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[14] *Bowsher*, of course, concluded that the Comptroller General was an agent of Congress, but this conclusion was based solely on congressional removal power, thus indicating not only that the power to remove is determinative but also that the appointment power itself does not establish the character of the office for purpose of separation of powers analysis—otherwise both the Comptroller General and the Chief Justice of the United States would be federal executive officers since they are appointed by the President.

phrey's Executor v. United States, 295 U.S. 602, 628 (1935) (Federal Trade Commission not an Executive Branch agency because President's removal power is limited by statute); *Wiener v. United States*, 357 U.S. 349, 353 (1958) (members of presidentially-appointed War Claims Commission not within Executive Branch because President does not have removal power); *Bowsher*, 478 U.S. at 727-28 (Comptroller General is agent of Congress rather than the Executive because, although appointed by the President, he is "removable only at the initiative of Congress"). Under the original Transfer Act, this Court concluded that the ability of the congressional leadership to change committee assignments vested removal power in Congress. *CAAN*, 501 U.S. at 269. But under the amended Transfer Act, members of the Board of Review are removable only by the Authority and not by Congress. 49 U.S.C. app. § 2456(f)(11). Thus, by holding that members of the Board of Review are agents of Congress even when Congress has no power to remove them from office, the court below has adopted a rule fundamentally at odds with this Court's prior decisions, including *CAAN*.

Lastly, the court of appeals' opinion assumes that, because some members of the Board of Review are Members of Congress, the Board of Review must be characterized as an agent of Congress. *See Hechinger*, slip op. at 8; App. 8a-9a. On this point petitioners respectfully submit that the court below misread this Court's reasoning in *CAAN* and overlooked the fact that a non-federal, interstate agency rather than a federal entity is at issue. In *CAAN*, the Court acknowledged the Framers' intent that Members of Congress not be precluded from holding non-federal office. *CAAN*, 501 U.S. at 270 n.16. Nor did *CAAN* suggest that Members could not serve on an advisory board. *CAAN*, 501 U.S. at 267; *see also Mistretta v. United States*, 488 U.S. 361, 400-01 (1989) (describing longstanding tradition of inter-branch membership of boards and commissions). What primarily prompted this

Court to hold that the Board was in fact an agent of Congress was the requirement that Board members be members of certain congressional committees, thereby allowing committee assignments to dictate removal and appointment of Board members. *See id.* As noted above, the 1991 Amendments cured the Transfer Act of this defect.

In sum, Congress carefully amended the Transfer Act to eliminate its control over the appointment of Board members, to eliminate its control over the removal of Board members, to eliminate its veto power over decisions of the Airports Authority, and to create general, neutral qualifications for Board membership. In fashioning these changes Congress was guided by this Court's decision in *CAAN* and by other precedents discussing agency relationships under separation of powers doctrine. Petitioners respectfully submit that the decision of the court below wrongly implied an agency relationship between Congress and the Board of Review based on analysis contrary to the longstanding decisions of this Court.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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November 22, 1994

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHN W. HECHINGER, *et al.*,
Petitioners,

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, *et al.*,
Respondents,

UNITED STATES OF AMERICA,
Intervenor.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 19, 1994 Decided September 27, 1994

No. 94-7036

JOHN W. HECHINGER, JR.; CRAIG H. BABB; CITIZENS FOR THE ABATEMENT OF AIRCRAFT NOISE, INC.,
Appellees

UNITED STATES OF AMERICA,
Intervenor for Appellee

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY; BOARD OF REVIEW,
Appellants

Appeal from the United States District Court
for the District of Columbia

D.D.C. No. 92cv00556)

Before BUCKLEY, WILLIAMS, and ROGERS, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* BUCKLEY.

BUCKLEY, *Circuit Judge*: The Metropolitan Washington Airports Authority operates the Washington National and Dulles International Airports under lease from the Federal Government and is required by statute to submit certain actions to a Board of Review before they

may take effect. As originally enacted, the statute stipulated that the Board be composed entirely of Members of Congress and gave it the power to veto the Authority's actions. In 1991, the Supreme Court held that the Board was an agent of Congress and that it exercised federal power in violation of the doctrine of the separation of powers. The Court's decision was based in significant degree on the Board's mandatory congressional membership and its veto power. Although Congress has since amended the statute to eliminate these provisions, we conclude that the amendments impose other qualifications for Board membership and have vested the Board with other powers that, together, continue to offend the Constitution.

I. Background

In 1987, the Secretary of Transportation entered into a long-term lease of the Washington National and Dulles International Airports to the Metropolitan Washington Airports Authority ("Authority"), an independent regional authority that had been created two years earlier by compact between the Commonwealth of Virginia and the District of Columbia. Prior to that time, the two airports had been operated by the Federal Government.

The lease was authorized by the Metropolitan Washington Airports Act of 1986 ("Transfer Act") (codified as amended at 49 U.S.C. app. §§ 2451-2461 (1988 & Supp. III 1991)). Congress conditioned the lease on the Authority's establishment of a Board of Review ("Board") consisting of nine Members of Congress. *Id.* § 2456(f)(1) (1988) (superseded); *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 111 S. Ct. 2298, 2303 (1991) ("*CAAN*"). Under the congressional scheme, the Authority was required to submit the following actions for the Board's consideration at least 30 calender days before they were to become effective (60 days in the case of the annual budget):

(i) the adoption of an annual budget;

(ii) the authorization for the issuance of bonds;

(iii) the adoption, amendment, or repeal of a regulation;

(iv) the adoption or revision of a master plan, including any proposal for land acquisition; and

(v) the appointment of the chief executive officer.

49 U.S.C. app. § 2456(f)(4)(B) (1988) (superseded). If the Board did not disapprove an action within 30 days, it could take effect. 49 U.S.C. app. § 2456(f)(4)(C) (1988) (superseded).

On June 17, 1991, the Supreme Court ruled that the Board was vested with power that violated the constitutional doctrine of the separation of powers. *CAAN*, 111 S. Ct. at 2312 (1991) (affirming judgment in *Citizens for the Abatement of Aircraft Noise, Inc. v. Metropolitan Washington Airports Auth.*, 917 F.2d 48 (D.C. Cir. 1990)). Within six months, Congress enacted amendments to the Transfer Act ("1991 Amendments" or "Amendments") that effected major changes in the composition and powers of the Board.

We begin with the first. As originally enacted, the Transfer Act required that the nine members of the Board be Members of Congress, of whom eight had to be members of specified congressional committees having jurisdiction over transportation issues. The Board members were to be chosen from lists furnished by the Speaker of the House and the President *pro tempore* of the Senate. 49 U.S.C. app. § 2456(f)(1) (1988) (superseded). The Supreme Court noted the following problems with this arrangement:

> The list system, combined with congressional authority over committee assignments, guarantees Congress effective control over appointments. Control over committee assignments also gives Congress effective

> removal power over Board members because depriving a Board member of membership in the relevant committees deprives the member of authority to sit on the Board.

CAAN, 111 S. Ct. at 2308. After this admonishment, Congress revised the composition of the Board to require that

> [m]embers of the Board of Review shall be individuals who have experience in aviation matters and in addressing the needs of airport users and who themselves are frequent users of the Metropolitan Washington Airports. A member of the Board of Review shall be a registered voter of a State other than Maryland, Virginia, or the District of Columbia.

49 U.S.C. app. § 2456(f)(2)(C). While the Authority's Board of Directors ("Directors") continues to appoint the members of the Board of Review and now has the power to remove members for cause, *id.* § 2456(f)(11), the Directors are still confined to the lists of nominees submitted by the Speaker and the President *pro tempore*. *Id.* § 2456(f)(1).

The 1991 Amendments also redefined the powers of the Board. While they eliminated the Board's veto authority, they expanded its other powers in a number of significant ways. The Amendments extended the list of actions requiring Board review to include "the award of a contract . . . which has been approved by the board of directors of the Airports Authority" as well as "any action of the board of directors approving a terminal design or airport layout or modification of such design or layout[,]" 49 U.S.C. app. § 2456(f)(4)(B) (Supp. III 1991), and authorized members of the Board to participate in, but not vote at, meetings of the Directors. *Id.* § 2456(f)(7). The Amendments also made substantial changes in the review process, including a grant to the Board of the authority to make recommendations regarding actions submitted for its re-

view, *id.* § 2456(f)(4)(C), such actions to be referred to Congress for its further review if the Directors fail to adopt the Board's recommendations. *Id.* § 2456(f)(4)(D)(ii).

Specifically, the amended Transfer Act provides that the Board may, within 30 calendar days or 10 "legislative days" of its submission, whichever is longer, present to the Directors a recommendation concerning a proposed action. *Id.* § 2456(f)(4)(C). Legislative days are calculated by

> excluding Saturdays, Sundays, and holidays, and any day on which neither House of Congress is in session because of an adjournment sine die, a recess of more than 3 days, or an adjournment of more than 3 days. . . .

Id. If no recommendation is made during that period, or if the Board decides it will make no recommendation before the period elapses, the Directors' proposal may take effect. *Id.*

Similarly, if the Board makes a recommendation and the Directors adopt it, the revised proposal may go into effect immediately. *Id.* § 2456(f)(4)(D)(i). If the Directors do not adopt the Board's recommendation, the Directors must submit a detailed description of the proposed action, the Board's recommendation, and the Directors' evaluation and response to the recommendation to the Speaker of the House and the President of the Senate for a review period of 60 legislative days. *Id.* § 2456(f)(4)(D)(ii). If Congress does not pass a joint resolution of disapproval within this period, the Directors' proposed action may take effect. *Id.* § 2456(f)(4)(D)(i), (5)(B).

Among the features of the original Act that have been retained are the Board's authority to "request the . . . Authority to consider and vote, or to report, on any matter related to" the Dulles or National Airports, to which the Authority must comply "as promptly as feasible," *id.*

§ 2456(f)(6), and what may be described as the 1986 Act's "drop-dead" clause. It provides that if the Board of Review

> is unable to carry out its functions under this subchapter by reason of a judicial order, the Airports Authority thereafter shall have no authority to perform any of the actions that are required . . . to be submitted to the Board of Review.

Id. § 2456(h).

On cross-motions for summary judgment, U. S. District Judge Joyce Hens Green concluded that the Board of Review was an agent of Congress that exercised federal power, *Hechinger v. Metropolitan Washington Airports Auth.*, 845 F. Supp. 902, 907 (D.D.C. 1994), and held that the amended Act was unconstitutional in that it permitted the Board to exercise impermissible control over the Authority. *Id.* at 908. Judge Green also held that the members of the Board were selected in a manner that violated the Constitution's Appointments Clause. *Id.* at 908-09. As we agree that the Board is a congressional agent that exercises significant federal power in violation of separation-of-powers principles, we do not address the latter ruling.

II. Analysis

A. Is the Board of Review an Agent of Congress?

Following the approach adopted by the Supreme Court in *CAAN*, 111 S. Ct. at 2306-09, we first determine whether the Board is an agent of Congress. No single factor is dispositive. Among the factors considered by the *CAAN* Court were the conditioning of the lease of the two airports on the Authority's creation of the Board of Review, the presence of the drop-dead clause, the Federal Government's

> strong and continuing interest in the efficient operation of the airports . . . [which] motivated the crea-

> tion of the Board of Review, . . . [and][m]ost significant, [that] membership on the Board of Review [was] limited to federal officials, specifically members of congressional committees charged with authority over air transportation.

CAAN, 111 S. Ct. at 2307. The Court concluded:

> We thus confront an entity created at the initiative of Congress, the powers of which Congress has delineated, the purpose of which is to protect an acknowledged federal interest, and membership in which is restricted to congressional officials. Such an entity necessarily exercises sufficient federal power as an agent of Congress to mandate separation-of-powers scrutiny.

Id. at 2308.

As amended, the Transfer Act presents us with the same entity, although devoid of the explicit membership restrictions. The new Board and its powers continue to be the creation of Congress, the drop-dead provision remains in place, and the federal interest in the efficient operation of the two airports continues unchanged. The question, then, is whether erasing the condition that the Board's membership be limited to Members of Congress, eight of whom sit on specified congressional committees, while requiring the Authority to select members from lists prepared by the Speaker of the House and the President *pro tempore* of the Senate, suffices to eliminate the Board's status as an agent of Congress and thus immunizes the amended Act from separation-of-powers review.

It is true that the Court found the original membership condition "[m]ost significant." *Id.* at 2307. Yet this condition was but one of "[s]everal factors combin-[ing]" to warrant separation-of-powers analysis, *id.* at 2306-07. Its elimination, then, does not end our inquiry. Indeed, the Court specifically called for a functional ap-

proach, reminding us that " 'separation-of-powers analysis does not turn on the labeling of an activity.' " *Id.* at 2307 (quoting *Mistretta v. United States*, 488 U.S. 361, 393 (1989)).

To this end, we look to the revised provisions establishing the Board. Its members must be: (1) frequent users of the Metropolitan Washington Airports; (2) registered voters of a State other than Maryland, Virginia, or the District of Columbia; and (3) experienced in aviation matters and in addressing the needs of airport users. 49 U.S.C. app. § 2456(f)(2)(C). Hechinger maintains that these qualifications are met by Members of Congress who serve on the relevant oversight committees, thus assuring their domination of the Board. Similarly, the United States, an intervenor, argues that the district court correctly concluded that the new requirements for Board membership "ensured that many members of Congress—and few others—will be eligible to serve on the Board of Review." *Hechinger*, 845 F. Supp. at 907. The Authority responds that these requirements do not compel the selection of a Member of Congress but merely ensure that the Board will provide nationwide users with informed representation.

While it is true that Board membership is no longer limited to Representatives and Senators who sit on committees that have jurisdiction over air transportation, as a practical matter, relatively few individuals other than members or alumni of those committees will be able to meet the new criteria. Thus it is hardly happenstance that of the nine members appointed to the Board following adoption of the 1991 Amendments, eight were Members of Congress who served on committees having jurisdiction over air transportation—the lone outsider being a former Secretary of Transportation. *Cf. C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1684 (1994) (Court looks beyond "explicit terms" of facially neutral local ordinance to its "pracical effect and design.").

We are also struck by Congress's choice of the period within which the Board must make its recommendations: the longer of 30 calendar days or 10 legislative days. Again, it is not happenstance that computation of the latter requires the exclusion of those days on which Representatives and Senators may be expected to be out of town; namely, the weekends, holidays, and congressional adjournments and recesses when they are free to work in their respective constituencies. *Id.* § 2546(f)(4)(C). There can be no reason for such a provision other than to serve the convenience of the Members of Congress who were expected to serve on the Board.

Finally, we examine the manner in which the members of the Board are selected. While they are no longer required to be Members of Congress, and while they may now be removed for cause by the Directors, *id.* § 2456(f)(11), they must still be nominated by the Speaker of the House or the President *pro tempore* of the Senate. *Id.* § 2456(f)(1). It is true that the Directors may request that additional names be submitted, *id.* § 2456(f)(1), but we have little doubt who would win a test of wills because the 1991 Amendments also provide that at any time that the Board

> has more than 4 vacancies and lists have been provided for appointments to fill such vacancies, the Airports Authority shall have no authority to perform any of the actions that [must] be submitted to the Board of Review.

Id. § 2456(f)(2)(D).

In *CAAN*, the Supreme Court found it significant that "appointments *must* be made from the lists, and there is no requirement that the lists contain more recommendations than the number of Board openings." 111 S. Ct. at 2308 (emphasis in original). This remains true of the amended Act. Because the Directors may never go outside the lists furnished by the Speaker and the President

pro tempore, we conclude that Congress retains control over appointments. This control, together with the provisions that in practice ensure that the Board will be dominated by Members of Congress, persuades us that Congress intended the Board to serve, and we hold that it does serve, as its agent.

B. Does the Board of Review Exercise Federal Power?

In order to determine the nature of the power exercised by the new Board, it is necessary to understand the practical consequences of its ability to delay actions that are contemplated by the Authority. Under the Transfer Act, the Board has the longer of 30 days or 10 legislative days within which to review certain actions proposed by the Directors. 49 U.S.C. app. § 2456(f)(4)(C); *see also id.* § 2456(f)(4)(B) (listing actions). The Board may let the proposal go into effect by allowing the waiting period to lapse, may "decide[ ] it will not make a recommendation on an action" (thereby allowing it to go into effect immediately), or may make recommendations regarding the action, including one that it not take effect. *Id.* § 2456(f)(4)(C). If recommendations are made and the Directors adopt them, the proposal may go into effect immediately, *id.* § 2456(f)(4)(D)(i); if the recommendations are not adopted, they must be transmitted, along with "a detailed description of the action . . . and the evaluation and response of the board of directors to [the Board of Review's] recommendation[s]," to Congress for a 60-legislative-day review period. *Id.* § 2456(f)(4)(D)(ii).

The Authority argues that because the Board has lost its right to veto and may only make recommendations, it has been stripped of power and serves solely in an advisory capacity. Yet the Board's loss of its veto power does not necessarily mean that it has lost the effective control over the Authority that the Supreme Court found to be an unconstitutional exercise of federal power. *See*

CAAN, 111 S. Ct. at 2308, 2312. We must therefore examine the potential impact of the Board's remaining authority on the Directors' decisionmaking. To this end, we examine the various ways in which the Board is able to affect the substance of the Authority's actions.

First, the Board may request the Authority "to consider and vote, or to report, on any matter related" to the two airports; and the Authority must do so "as promptly as feasible." *Id.* § 2456(f)(6). The Board thus has the ability to force any issue it wishes onto the Authority's agenda for priority consideration.

Second, members of the Board may participate as non-voting members in meetings of the Directors. *Id.* § 2456(f)(7). To paraphrase our comment in *Federal Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993), *cert. granted*, 114 S. Ct. 2703 (June 20, 1994), in which we invalidated an arrangement whereby Congress appointed two of its agents as non-voting *ex officio* members of the Federal Election Commission, "we cannot conceive why Congress would wish [members of the Board of Review to participate in meetings of the Directors] if not to exercise *some* influence." *See id.* at 826 (emphasis in original). Even if the members "were to remain completely silent during all deliberations (a rather unlikely scenario), their mere presence as agents of Congress [would] convey [ ] a tacit message to the [Directors]." *Id.* at 826. We held, in that case, that "the mere presence of agents of Congress on an entity with executive powers offends the Constitution." *Id.* at 827. Although members of the Board may not vote at meetings of the Directors, they may attend them; they may place items on the agenda for the Directors' priority consideration; and they are free to express their views on proposed actions before the Directors have made the formal decisions that must then be submitted to the Board for its consideration. This arrangement raises the same concerns that underpinned our decision

in *NRA Political Victory Fund:* Advice . . . surely implies influence, and Congress must limit the exercise of its influence, whether in the form of advice or not, to its legislative role." *Id.*

Finally, and most significantly, the Board has the discretion to accelerate the implementation of a Directors' decision by promptly approving it or consigning it to the delays and uncertainties of a congressional review. The Authority argues that the Transfer Act's review requirements are nothing more than variations on legitimate "report-and-wait" provisions to be found in other statutes. These typically require that a federal agency's proposed actions be referred to Congress for a period that is long enough to permit them to be studied and, if found wanting, to allow for the passage of a joint resolution of disapproval. *See, e.g., Sibbach v. Wilson & Co., Inc.,* 312 U.S. 1, 15 (1941) (report-and-wait provision allowing Congress to review the Federal Rules of Civil Procedure and "veto their going into effect if contrary to the policy of the legislature"); *Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 689-90 (1987) (provision requiring Secretary of Labor to refer certain proposed regulations to transportation committees of both Houses of Congress).

Hechinger concedes that Congress could have constitutionally required that all the Directors' proposed actions be submitted to Congress for a period of review before taking effect. But Congress has vested the Board with a substantive role that distinguishes this case from the "report-and-wait" cases on which the Authority relies. The provisions in those cases require automatic referral of particular decisions to Congress; thus their effect on the referring party's decisionmaking is neutral. Here, by contrast, the Board has the ability to decide whether action taken by the Directors will be allowed to take immediate effect or be subjected to a 60-statutory-day congressional review. It is this discretion that provides the Board its leverage.

The Authority nevertheless sees an analogy between the Board's power to delay the effective date of Authority actions and that of the Comptroller General to stay the award of contracts under the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (1988) ("CICA"), which two circuit courts have upheld. *See Ameron, Inc. v. United States Army Corps of Eng'rs*, 809 F.2d 979 (3d Cir. 1986); *Lear Siegler, Inc., Energy Prods. Div. v. Lehman*, 842 F.2d 1102 (1988), *irrelevant portion withdrawn en banc*, 893 F.2d 205 (9th Cir. 1989). CICA authorizes the Comptroller General to investigate complaints that a federal agency has solicited bids or awarded a contract in violation of the law. If the Comptroller General notifies an agency that a rejected bidder has filed a protest, the award of the contract is automatically stayed pending an investigation of the disputed bidder's charges. 31 U.S.C. § 3553(c)(1). The Comptroller General may take up to 90 working days to conduct the investigation but may dismiss the protest before they have expired (thereby lifting the stay) if he finds it to be frivolous or facially invalid. *Id.* § 3554(a)(1), (3). On the other hand, the stay may be overridden by

> [t]he head of the procuring activity responsible for award of a contract . . . upon a written finding . . . that urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General. . . .

Id. § 3553(d)(2)(A)(ii). If the Comptroller General finds a breach of the laws governing the solicitation or award of government contracts, he must make appropriate recommendations to the agency, *id.* § 3554(b)(1); and if these are not implemented, he must record the pertinent information in a report he is required to submit to Congress on an annual basis. *Id.* § 3554(e)(2).

In *Ameron*, the Third Circuit concluded that the Comptroller General's ability to shorten the 90-day stay

provision might well cause procurement officials to "exercise their discretion in ways which are not required by the procurement laws, and which they would not otherwise have chosen, in order to minimize conflict with the Comptroller General." It found, however, that "any potential disruption of the executive function [was] minimal." *Ameron*, 809 F.2d at 997. The Ninth Circuit's analysis was similar:

> [T]he proper inquiry is not whether a legislative agent can temporarily "bind" or "directly affect" parties outside the legislative branch, but rather whether the legislative agent exercises *control* or ultimate authority in the disposition of a particular issue. It is clear that the stay provisions do not establish such control. As noted above, the stay is temporary, usually 90 working days or less. Because the recommendations of the Comptroller General are non-binding, the stay cannot be used to coerce the procuring agency to make a particular final disposition; rather the stay provisions force nothing more than a dialogue between the procuring agency and the legislature.

Lear, 842 F.2d at 1110 (emphasis in original). The Ninth Circuit stressed that the imposition of a stay was initiated by a bid protester, not the Comptroller General, and that the Comptroller General may only consider the length of time necessary to decide the bid protest in varying the length of the stay and "is not authorized to consider the importance or wisdom of the purchase decision." *Id.* at 1111; *see also Ameron*, 809 F.2d at 997.

The authority wielded by the Board under the Transfer Act is significantly greater than that of the Comptroller General under CICA. Unlike CICA, the amended Act does not condition the Board's review authority on third-party complaints; rather, it authorizes the Board to review particular issues considered by the Authority. Second, and more important, the Act does not allow the Au-

thority to override the Board, a safeguard that both *Lear* and *Ameron* viewed as vital in concluding that the stay provisions did not vest the Comptroller General with power over persons outside the legislative branch. *Lear*, 842 F.2d at 1111 ("Were the Comptroller General thus able to stay a procurement contract indefinitely, a serious issue of his control over procurement would be raised . . . [However, the override] provision lodges ultimate authority over the timing of the contracts with the executive branch and obviates the problem of an indefinite stay."); *Ameron*, 809 F.2d at 997 ("If the Comptroller General really does require so much time to decide the protest that the stay interferes with important executive interests, CICA authorizes the executive to override the stay.") (footnote omitted).

By contrast, the Directors' inability to override the Board and forestall congressional review is a serious hindrance to the Authority, because many of the decisions subject to review, such as the adoption of budgets, the letting of contracts, and the issuance of bonds, are time-sensitive. Major airports are complex operations, especially when, as here, significant capital improvement programs are in progress. Any delay in the adoption of an annual budget and any suspension of the authority to let contracts or issue bonds can result in millions of dollars of additional costs and can adversely affect the public safety. See Affidavit of James A. Wilding, General Manager of the Authority (Feb. 14, 1994) at 4, 7-9 (supporting Authority's motion for stay of district court's order). The pressure to avoid such costly interruptions by accommodating the Board is self-evident.

The Authority acknowledges that the Board is in a position to influence the Directors, but it maintains that the ways in which the Board may affect their decisions are indistinguishable from those by which Congress is able "to advise, coordinate, and even directly influence an executive agency . . . through oversight hearings, appro-

priation and authorization legislation, or direct communication with the [agency]." *NRA Political Victory Fund,* 6 F.3d at 827. There can be no question that Congress is able to exercise enormous influence over agency decisions in these and other constitutionally permissible ways. But there is a qualitative difference between these channels for congressional influence and the structural relationship between Board and Authority that the Transfer Act has established—the difference between persuasion and coercion.

In *CAAN,* the Court quoted James Madison on the potential that always exists, in democratic societies, for the abuse of legislative power:

> It will not be denied, that power is of an encroaching nature, and that it ought to be effectively restrained from passing the limits assigned to it.
>
> * * *
>
> [The legislative department's] constitutional powers being at once more extensive and less suspectible of precise limits, it can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not unfrequently a question of real-nicety in legislative bodies, whether the operation of a particular measure, will, or will not extend beyond the legislative sphere.

111 S. Ct. at 2310-11 (quoting The Federalist No. 48, pp. 332-34 (J. Cooke ed. 1961) (J. Madison)).

We acknowledge that we are dealing with "a question of real-nicety," but we are satisfied that Congress has here encroached "beyond the legislative sphere" because the Board of Review has been vested with a range of powers whose cumulative effect is to enable it to interfere impermissibly with the Directors' performance of their independent responsibilities. In the place of the veto provision, the amended Transfer Act empowers the Board to

choose, in its sole discretion, which of the Authority's decisions may be implemented immediately and which will be subjected to the risks and delays of congressional review. In the place of mandatory congressional membership on the Board, it sets forth requirements that both in principle and in practice continue to ensure congressional domination of the Board. In redefining the powers of the Board, it actually expands the scope of its review. Moreover, the amended statute retains provisions permitting the Board to compel the Authority to consider particular issues and conditioning the Authority's ability to take vital actions on the Board's own continuing ability to exercise its powers under the Act.

What tips the balance, in our judgment, is the Board's power to delay and perhaps overturn critical decisions by requiring their referral to Congress. The delays it can impose are hardly trivial. The 60-legislative-day congressional review period will extend for at least three months and, depending on the congressional cycle, can last as long as six. Affidavit of Pamela Gilbert, Legislative Director of Public Citizen's Congress Watch (May 28, 1992) at 2. *Cf. Bliley v. Kelly*, 23 F.3d 507, 509 (D.C. Cir. 1994) (30-legislative-day congressional review period extended from January 11, 1991 to March 6, 1991—a period of 54 calendar days.) Thus, as Judge Green aptly put it,

> [u]pon receipt of a "recommendation" from the Board of Review, the Airports Authority has two choices. It can adopt the recommendation . . . [or] transmit a detailed description of the proposed action to Congress. . . . In short, the Airports Authority must either bow to the will of the Board of Review, or risk the time and uncertainty of congressional action. This power is far more than merely "advisory" as defendants claim; it gives the Board of Review the power to coerce the Airports Authority to comply with any "recommendation."

Hechinger, 845 F. Supp. at 908. The mere existence of this power to delay provides the Directors with an enormous incentive to avoid confrontations by tailoring their decisons to suit the Board's pleasure; it also gives the Board the power to hold an important decision hostage in order to secure the Directors' agreement to an unrelated matter.

We do not suggest that the Board has or would abuse its authority in such a manner. But the potential for abuse is there. As the Supreme Court observed in *CANN*,

> the statutory scheme challenged today provides a blueprint for extensive expansion of the legislative power beyond its constitutionally-confined role. Given the scope of the federal power to dispense benefits to the States in a variety of forms and subject to a host of statutory conditions, Congress could, if this Board of Review were valid, use similar expedients to enable its Members or its agents to retain control, outside the ordinary legislative process, of the activities of state grant recipients charged with executing virtually every aspect of national policy. As James Madison precisely observed, the legislature "can with greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments."

111 S. Ct. at 2312 (quoting The Federalist No. 48 at 334 (J. Cooke ed. 1961)). To our mind, Congress's revisions of the Transfer Act have not satisfied the concerns expressed in *CAAN*. Although the Board's veto power has been eliminated, the nature of the relationship between the Board and the Directors is such that the latter must necessarily trim their sails to accommodate the former's wishes. This, in our judgment, is a sufficient exercise of federal power to violate the doctrine of the separation of powers. Having so determined, it is not necessary for us to classify the nature of that power:

> If the [Board of Review's] power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7.

CAAN, 111 S. Ct. at 2312.

III. Conclusion

For the foregoing reasons, we agree with the district court's conclusion that the provisions of the amended Transfer Act, taken together, indicate that the Board of Review remains a congressional agent and that it exercises power in violation of the doctrine of the separation of powers; accordingly, we affirm the district court's judgment. We direct, however, that actions taken by the Board to this date not be invalidated automatically on the basis of our decision. *See Buckley v. Valeo*, 424 U.S. 1, 142 (1976) (past acts of invalidly constituted Commission accorded "*de facto* validity").

So ordered

[Filed Oct. 24, 1994]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-7036

JOHN W. HECHINGER, JR., *et al.*,
Appellees,

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, *et al.*,
Appellants.

BEFORE: Buckley, Williams and Rogers, Circuit Judges

ORDER

Upon consideration of Appellants' Unopposed Emergency Motion for Extension of Stay of Judgment and Effective Date of Opinion and Order of the District Court, and For Stay of Mandate and Effective Date of Opinion and Order of This Court Pending Petition for Writ of Certiorari and Possible Congressional Action, it is

ORDERED, by the Court, that the stay granted by this Court applicable to the district court's judgment and the effective date of the district court's opinion and order remain in force pending the later of the filing of and final disposition of the case by the Supreme Court on a petition for a Writ of Certiorari; or, should the Supreme Court decline to issue a Writ of Certiorari, 60 days after such denial of certiorari; or until March 31, 1995; it is

FURTHER ORDERED, by the Court, that the mandate and effective date of this Court's opinion and order

dated September 27, 1994 be stayed pending the later of the filing of and final disposition of the case by the Supreme Court on a petition for a Writ of Certiorari; or, should the Supreme Court decline to issue a Writ of Certiorari, 60 days after such denial of certiorari; or until March 31, 1995.

Per Curiam
FOR THE COURT:

RON GARVIN
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

[Filed Jan. 31, 1994]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-556 (JHG)

JOHN W. HECHINGER, *et al.*,
Plaintiffs,

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiffs, John W. Hechinger, Sr., Craig H. Baab, and Citizens for the Abatement of Aircraft Noise, Inc., initiated this action challenging the constitutionality of defendant Board of Review. The Board of Review is an entity with the power to review certain actions of defendant Metropolitan Washington Airports Authority ("Airports Authority"); which was created to operate the metropolitan Washington airports located in the Virginia suburbs. Plaintiffs allege that the Board of Review violates the doctrine of separation of powers and that its members are appointed in violation of the Appointments Clause [1] and serve in violation of the Incompatibility and Ineligibility Clause.[2]

Through this action, plaintiffs seek: (1) a declaration that the Board of Review is unconstitutional; and (2) an order enjoining the Board of Review from exercising its review authority and enjoining the Airports Authority from performing any actions that it is required to submit to the Board of Review. The parties filed cross-motions for summary judgment. In addition, the United States

[1] United States Const. Art. II, § 2, cl. 2.

[2] United States Const. Art. I, § 6, cl. 2.

filed a statement of interest pursuant to 28 U.S.C. § 517, in which it offered its views supporting the plaintiffs' position that the Board of Review is unconstitutional. For the reasons expressed below, plaintiffs' motion for summary judgment is granted and defendants' motion for summary judgment is denied.

I. *Background*

These parties are before this Court for the second time to litigate the constitutionality of the Board of Review. Although the new Board of Review will be evaluated without any taint from the earlier proceedings, it is necessary to review certain details from the earlier litigation to properly understand the present action. *See Century Communications Corp. v. FCC*, 835 F.2d 292, 299 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

The federal government historically maintained control over the two metropolitan Washington airports in the Virginia suburbs, Washington National Airport ("National") and Dulles International Airport ("Dulles"). In the mid-1980's, however, the Secretary of Transportation ("Secretary") determined that it was necessary to shift control over these airports away from the federal government to ease the burden of financing capital improvements. The Secretary recommended that the federal government transfer control over these airports to a regional authority and appointed an advisory commission to develop a plan to create this authority.

The advisory commission recommended that this regional authority be created by a congressionally approved compact between Virginia and the District of Columbia. The advisory commission further recommended that an eleven-member Board of Directors, composed of individuals who were neither elected nor appointed officials, govern the authority, and that ten of these directors reside in the metropolitan Washington area. These recommenda-

tions were intended not only to ensure the non-political nature of the authority but to protect local interests as well.

In accordance with the Metropolitan Washington Airports Act of 1986, Pub. L. No. 99-591, 99th Cong., 2d Sess. (1986) ("Transfer Act") (codified at 49 U.S.C. App. §§ 2451-2461), Virginia and the District of Columbia passed legislation to establish the Airports Authority. *See* 1985 Va. Acts, ch. 598, as amended by 1987 Va. Acts ch. 665; 1985 D.C. Law 6-67, as amended by 1987 D.C. Law 7-18. The Transfer Act authorized the transfer of operating control over National and Dulles to the Airports Authority, which was to be independent of the federal, Virginia, and District of Columbia governments. 49 U.S.C. App. § 2456(a)(6). The Transfer Act established a Board of Directors to govern the Airports Authority, but mandated the creation of the Board of Review to review certain actions of the Board of Directors.

The original Board of Review was composed of nine members of Congress, eight of whom served on specified congressional committees and none of whom could be from Maryland, Virginia, or the District of Columbia. 49 U.S.C. App. § 2456(f)(1). The Board of Directors had to submit many core decisions to the Board of Review for approval, including the adoption of its budget, authorization of bonds, promulgation of regulations, adoption of a master plan, and the appointment of its chief executive officer. 49 U.S.C. App. § 2456(f)(4)(B). Significantly, the Board of Review could veto any of these core decisions. 49 U.S.C. App. § 2456(f)(4)(D). Moreover, the legislation provided that the Airports Authority could not independently carry out any of these core functions if a court declared the Board of Review unconstitutional. 49 U.S.C. § 2456(h).

The Airports Authority assumed operating responsibility of National and Dulles in mid-1987, pursuant to a

lease that contained all of the provisions of the Transfer Act. Subsequently, plaintiffs filed a lawsuit challenging the constitutionality of the original Board of Review. In that earlier lawsuit, *Citizens for the Abatement of Aircraft Noise, Inc. v. Metropolitan Washington Airports Authority*, 718 F. Supp. 974 (D.D.C. 1989), *rev'd in part*, 917 F.2d 48 (D.C. Cir. 1990), *aff'd*, 111 S. Ct. 2298 (1991) [hereinafter *"CAAN I"*], the Supreme Court held that the Board of Review, as then comprised, was unconstitutional.[3] The Court determined that the Board of Review exercised sufficient federal power to mandate separation of powers scrutiny even though the Airports Authority was technically a creature of state law. 111 S. Ct. at 2306. Separation of powers scrutiny was necessary because transfer of control over National and Dulles was conditioned on the creation of the Board of Review and the federal government has a strong and continuing interest in the operation of these airports. *Id.* at 2307.

The Supreme Court further determined that the Board of Review was an agent of Congress. Membership on the Board of Review was restricted to members of Congress, all but one of whom served on particular committees. Thus, the Board of Review was composed exclusively of members of Congress and Congress could control who served on the Board of Review by altering the membership on the relevant committees. In essence, Congress had the power to appoint and remove members of the Board of Review. *Id.* at 2307-08.

In sum, the Court invalidated the Board of Review because it was "an entity created at the initiative of Congress, the powers of which Congress has delineated, the purpose of which is to protect an acknowledged federal interest, and membership in which is restricted to con-

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[3] In the earlier lawsuit between these parties, the United States filed a statement of interest supporting the defendants' position that the Board of Review was constitutional.

gressional officials." *Id.* at 2308. The Board of Review was simply an improper attempt by Congress either to assume executive responsibilities or to exercise legislative authority in violation of the bicameralism and presentment requirements of Article I, Section 7. *Id.* at 2312.

In response to the Supreme Court's decision, Congress passed the Metropolitan Washington Airports Act Amendments of 1991, Pub. L. No. 102-240, Title VII, 105 Stat. 2197 (Dec. 18, 1991) ("1991 Amendments"). The 1991 Amendments retained the Board of Review, but altered its composition, the qualifications for membership, and its powers.[4] President Bush signed the 1991 Amendments into law on December 18, 1991, but expressed concern about the constitutionality of these provisions in his signing statement:

> During congressional consideration of amendments intended to cure the defects found by the Supreme Court, the Administration expressed the view that the new Board of Review created by Title VII would violate the Appointments Clause of the Constitution. We adhere to this view, noting that the matter will now be resolved in court.

Plaintiffs' Motion for Summary Judgment, Exhibit A.

The new Board of Review is composed of nine individuals, all of whom the Board of Directors must select from lists submitted by the Speaker of the House ("Speaker") and the President *pro tempore* of the Senate ("President *pro tempore*"). 1991 Amendments § 7002 (a)(1). Although the Board of Directors may request additional recommendations, there is no requirement that the Speaker and the President *pro tempore* submit more names than the number of vacancies on the Board of

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[4] The 1991 Amendments retained many aspects of the old Board of Review, notably the provision that the Airports Authority cannot perform any action subject to oversight by the Board of Review if a court declares the Board of Review unconstitutional.

Review. *Id.* Further, the Board of Review is not expressly limited to members of Congress. To qualify for membership on the Board of Review, a person must: (1) have experience in aviation matters and in addressing the needs of airport users; (2) be a frequent user of Metropolitan Washington Airports; and (3) be a registered voter in a jurisdiction other than Virginia, Maryland, or the District of Columbia. 1991 Amendments § 7002(b)(2)(C). In addition, members may be removed for cause by a two-thirds vote of the Board of Directors. 1991 Amendments § 7002(f)(1).

The 1991 Amendments also altered the power of the Board of Review. The Board of Review no longer has the express veto power that its predecessor enjoyed. Instead, the new Board of Review has the power to make "recommendations" to the Board of Directors regarding each of the core functions over which the original Board of Review had a veto power plus several additional core functions, such as the award of a contract, the design of a terminal, and transactions involving land. 1991 Amendments §§ 7002(d)(1), (2). If the Board of Review makes such a recommendation, the proposed action may take effect only if the Board of Directors adopts the recommendation or if the Board of Directors submits the proposed action to Congress and waits a specified number of days. 1991 Amendments § 7002(d)(2)(D).

II. *Discussion*

Summary judgment is appropriate when there is "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "The inquiry performed is the threshold inquiry of determining whether there is a need for trial—whether, in other words, there are any genuine issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 250 (1986). On considering a motion for summary judgment, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. At the same time, however, Rule 56 places a burden on the nonmoving party to "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

Plaintiffs claim that the 1991 Amendments did not remedy the constitutional defects of the Transfer Act. Specifically, plaintiffs make two related challenges to the new Board of Review. First, plaintiffs allege that the new Board of Review is "a congressional agent that may not, under the Constitution, exercise retained federal power to control the actions of the Airports Authority." Memorandum in Support of Plaintiffs' Motion for Summary Judgment ("Plaintiff's Mem.") at 18. Second, plaintiffs assert that members of the Board of Review are selected in violation of the Appointments Clause. *Id.* at 18-19.[6] Defendants, in contrast, claim that the new Board of Review is merely "an advisory body, whose task is to make recommendations to the Airports Authority." Memorandum of Points and Authorities in Support of Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment ("Defendants' Mem.") at 2. As such, defendants assert that the new Board of Review neither is an agent of Congress nor exercises significant federal authority. *Id.*

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[6] The decision today makes it unnecessary to address plaintiffs' corollary claim that members of Congress serve on the Board of Review in violation of the Incompatibility and Ineligibility Clause, U.S. Const. Art. I, § 6, cl. 2.

A. *The Powers of the Board of Review*

Plaintiffs first argue that the Board of Review cannot exercise its prescribed functions consistent with the Constitution. This challenge focuses on the doctrine of separation of powers and the requirements of biocameralism and presentment. The doctrine of separation of powers prohibits Congress, either directly or through its agents, from exercising executive power. *See Bowsher v. Synar*, 478 U.S. 714, 733 (1986). Similarly, Congress, either directly or through its agents, cannot exercise legislative power without complying with the requirements of bicameralism and presentment. *CAAN I*, 111 S. Ct. at 2312; *see INS v. Chadha*, 462 U.S. 919, 951 (1983).

To demonstrate that the Board of Review is constitutionally deficient, therefore, plaintiffs must show that the Board of Review is an agent of Congress and that it exercises some type of federal power. Plaintiffs have established both elements.

To reiterate, briefly, to qualify for membership on the Board of Review, a person must: (1) have experience in aviation matters and in addressing the needs of airport users; (2) be a frequent user of the metropolitan Washington airports; and (3) not to be a registered voter in Maryland, Virginia, or the District of Columbia. 1991 Amendments § 7002(b)(2)(C). The Airports Authority selects the members of the Board of Review, but it can only choose those individuals that either the Speaker or the President *pro tempore* recommend. If the Airports Authority is dissatisfied with the candidates recommended, it can request additional names for consideration. The Airports Authority can remove members of the Board of Review for cause by a two-thirds vote.

These criteria and conditions create an entity that is unquestionably an agent of Congress. Although Congress divested itself of removal power, it retained appointment power and ensured that many members of Congress—and few others—will be eligible to serve on the Board of

Review. Further, and more fundamentally, either the Speaker or the President *pro tempore* must select every member of the Board of Review. Although the Airports Authority may request additional names for consideration, it is forced to choose only those individuals recommended by Congress. Congress, therefore, retained extraordinary control over the composition of the Board of Review; the Board of Directors is without power to appoint anyone who has not received a recommendation from the congressional leadership.

Moreover, Congress clearly did not address the concerns that the Supreme Court expressed in *CAAN I*. In *CAAN I*, the Court declared that the original Board of Review mandated separation of powers review because it was "an entity created at the initiative of Congress, the powers of which Congress has delineated, the purpose of which is to protect an acknowledged federal interest, and membership in which is restricted to congressional officials." 111 S. Ct. at 2308. Pursuant to the 1991 Amendments, the Board of Review is still an entity created at the initiative of Congress, the powers of which Congress has delineated, and the purpose of which is to protect an acknowledged federal interest. The only change is that membership is not restricted to congressional officials, but rather to those selected by congressional officials. This superficial change is insufficient to insulate the Board of Review from constitutional scrutiny.[6]

The more provocative question is whether the Board of Review exercises federal power. And the answer is "yes." Pursuant to the 1991 Amendments, the Board of Review no longer has the power to veto actions of the Board of Directors. The Board of Review does, however, exercise significant control over the Airports Authority and management over its core aspects of operation through its power to make "recommendations." In fact,

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[6] Interestingly, eight of the nine members of the original Board of Review were promptly appointed to the new Board of Review.

the new Board of Review has power to influence more actions than the old Board of Review. In addition to control over the adoption of a budget, authorization for the issuance of bonds,[7] the promulgation of regulations, the adoption of a master plan, and the appointment of a chief executive officer, the new Board of Review can control the award of contracts, any terminal design or modification, and any land transaction. 49 U.S.C. App. § 2456(f)(4)(B); 1991 Amendments § 7002(d)(1)(E).

Upon receipt of a "recommendation" from the Board of Review, the Airports Authority has two choices. It can adopt the recommendation, at which point the proposal with the recommendation takes effect. 1991 Amendments § 7002(d)(2)(D). If the Airports Authority does not adopt a recommendation, it must transmit a detailed description of the proposed action to Congress. The action cannot take effect until after the expiration of sixty calendar days, "excluding Saturdays, Sundays, holidays, and any day on which neither House of Congress is in session because of an adjournment *sine die*, a recess of more than 3 days, or an adjournment of more than 3 days," unless Congress acts sooner. 1991 Amendments § 7002(d)(2)(D)(ii). This report and wait provision, in effect, gives the Board of Review power to delay an action of the Board of Directors by as long as six months.

The Airports Authority has a choice: accept the "recommendation" of the Board of Review for immediate enactment of the proposal, or submit the proposal to Congress, wait a potentially lengthy period of time, and hope that Congress does not disapprove the proposal. In short, the Airports Authority must disapprove the pro-

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[7] The power to affect the issuance of bonds is particularly critical since the primary reason for the creation of the Airports Authority was because it would have the "power to raise money by selling tax exempt bonds" to finance "necessary capital improvements." *CAAN I*, 111 S. Ct. at 2302.

posal. In short, the Airports Authority must either bow to the will of the Board of Review, or risk the time and uncertainty of congressional action. This power is far more than merely "advisory" as defendants claim; it gives the Board of Review the power to coerce the Airports Authority to comply with any "recommendation." The Constitution does not permit this agent of Congress to play such an influential role in controlling the actions of the Airports Authority. *See Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1108 (9th Cir. 1988) (stating that if "Congress 'in effect has retained control,' its action and the statuory provision on which it is based are unconstitutional") (quoting *Bowsher*, 106 S. Ct. at 3192), *rev'd on other grounds*, 893 F.2d 205 (9th Cir. 1989) (en banc).

B. *The Appointments Clause*

Plaintiffs next argue that the members of the Board of Review are selected in violation of the Appointments Clause. The Appointments Clause dictates that the President shall appoint all officers of the United States. U.S. Const., Art. II, § 2, cl. 2. Principal officers must be selected with the advice and consent of the Senate, and the appointment of inferior officers is vested in the President alone. *Id.; see Buckley v. Valeo*, 424 U.S. 1 (1976). The President does not select the members of the Board of Review; they are selected by the Airports Authority from lists provided by the Speaker and President *pro tempore*. If the Board of Review exercises significant executive authority,[8] the method of appointing its members is constitutionally defective. *Id.* at 126; *see Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631, 2640 (1991).

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[8] In the earlier lawsuit, the Court of Appeals noted that the actions of the Board of Review are "quintessentially executive." 917 F.2d at 56. The sole inquiry here, therefore, is whether the Board of Review exercises significant federal authority.

Defendants assert that there is no Appointments Clause violation because the Board of Review is a nonfederal, interstate agency. Defendants' Mem. at 33-34. This argument clearly is without merit. In *CAAN I*, the Supreme Court determined that "the fact that the Board of Review was created by state enactments is not enough to immunize it from separation-of-powers review." *CAAN I*, 111 S. Ct. at 2306-07. Defendants do not advance any reason why an Appointments Clause analysis should be any different. The strong federal interest of the Airports Authority plainly warrants Appointments Clause review.

Defendants also argue that the Board of Review does not exercise significant federal authority. Defendants' Mem. at 33. The Court has already considered and rejected this argument in the context of separation of powers and holds also that the members of the Board of Review are selected in violation of the Appointments Clause.

II. *Conclusion*

The Board of Review plays a pivotal role in the administration of the Metropolitan Washington Airports Act. It exercises significant executive powers delegated to it by Congress, which created the Board of Review and over which Congress continues to wield considerable control. This unconstitutionally violates separation of powers principles and the Appointments Clause.

Since the provisions regarding the Board of Review in the Metropolitan Washington Airports Act Amendments of 1991 have this date been found unconstitutional and the Board of Review must be, and is, invalidated, the MWAA is without authority "thereafter" to carry out those actions the Board of Review is required to oversee. 49 U.S.C.A. App. § 2456(h). It is, therefore, essential to direct (as did the Circuit Court) that "actions taken by the Board [of Review] to this date not be invalidated automatically on the basis of [this] decision."

CAAN I, 917 F.2d at 57-58; *see Buckley v. Valeo*, 424 U.S. 1, 142 (1976).

While there shall be no stay for the reasons noted herein, the Court clearly recognizes the impact of this decision and the immediate jeopardy of operations at both Washington National Airport and Dulles International Airport. I strongly urge that prompt review be given this matter in the Circuit Court and/or in Congress.

Therefore, for the reasons stated above, it is hereby

ORDERED that plaintiffs' motion for summary judgment is granted; it is

FURTHER DECLARED that the Board of Review is unconstitutional and its actions invalid from the date of this order; it is

FURTHER ORDERED that defendants' motion for summary judgment is denied.

IT IS SO ORDERED.

January 31, 1994

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

[Filed Feb. 15, 1994]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-556 (JHG)

JOHN W. HECHINGER, *et al.*,
Plaintiffs,

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, *et al.*,
Defendants.

MODIFICATION OF JANUARY 31, 1994
MEMORANDUM OPINION AND ORDER

Defendants, supported by the United States, urge the Court to reconsider its January 31, 1994, Memorandum Opinion and Order ("Opinion and Order") insofar as that decision denied a stay of the judgment. Plaintiffs oppose this request, arguing that a stay would permit defendants to continue their unconstitutional actions and, ultimately, cause irreparable harm to plaintiffs. Alternatively, plaintiffs assert that any stay be limited in duration to no more than thirty days to permit Congress to act and the defendants to seek expedited review in the Court of Appeals.

This Court recognizes its right to grant a stay pending appeal in cases in which it has declared a statute unconstitutional. *See Bowen v. Kendrick*, 483 U.S. 1304, 1304-05 (1987). Although initially inclined to deny the stay, the Court will re-examine that decision in light of the relevant factors: (1) the likelihood that the party seeking the stay will prevail on appeal; (2) the likelihood that party seeking the stay will be irreparably harmed; (3) the likelihood of harm to others if the stay is granted;

and (4) the public interest in granting the stay. *Cuomo v. United States Nuclear Regulatory Comm'n,* 772 F.2d 972, 974 (D.C. Cir. 1985) (citing *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.,* 559 F.2d 841, 843 (D.C. Cir. 1977).

It is, of course, difficult for the Court to conclude that defendants are likely to succeed on appeal. Nonetheless, recognizing the presumption of constitutionality of congressional action and that the other factors weigh in defendants' favor, a limited stay will be granted.

The immediate harm to defendants will indeed be irreparable absent a limited stay. Many capital improvement projects, an extensive concession contract, and other airport improvements were pending before the Board of Review on the date of this Court's order. These projects, which benefit not only the defendants but the public in its entirety, cannot proceed in the absence of a limited stay. Further, defendants have assured the Court that, as to these pending matters, "the Board of Review *had not and will not make a recommendation* . . . ." Memorandum of Points and Authorities in Support of Defendants' Motion for Modification or Clarification of the Court's Opinion and Order of January 31, 1994 and for Stay of the Judgment and of the Effective Date of the Opinion and Order, Pending Final Resolution of the Appeal at 3 (emphasis added).

On the other hand, any harm to plaintiffs is not immediate. Plaintiffs admit that they "may not have a particular interest" in the pending matters, but state that "A some point, the major decisions solidifying the expansionist course will be completed." Plaintiffs' Opposition to Defendants' Motion for a Stay and Motion for Modification or Clarification of this Court's Opinion and Order at 2, 6. This speculative harm does not outweigh the immediate harm to defendants in the absence of a stay.

This case, however, does not justify the indefinite stay that defendants seek. Such a stay might ultimately cause irreparable harm to plaintiffs as airport expansion crosses a point of no return. Further, and more critically, an indefinite stay would remove any incentive for defendants to seek expedited review in the Court of Appeals or in Congress.

Upon balancing all of the relevant factors, therefore, a stay of seventy-five (75) days from the date of the original Opinion and Order is warranted. Such a stay is long enough to prevent irreparable harm to defendants, and, at the same time, is not too long such that it risks irreparable harm to plaintiffs. It also will permit the Metropolitan Washington Airports Authority ("MWAA") to continue its progress as to those matters for which the Board of Review was not going to exercise its constitutionally offensive power to make "recommendations." Further, a stay of seventy-five days will permit defendants to seek expedited review in the Court of Appeals and/or immediately bring these issues before Congress. Of course, defendants are in no way precluded from making an application to the Court of Appeals for an enlargement of this stay, if and when appropriate.

The Court reiterates its earnest hope that prompt action is taken on this matter. Accordingly, it is hereby

ORDERED that, pursuant to this Court's January 31, 1994 Opinion and Order, all actions taken by the MWAA that were approved by the Board of Directors and submitted to the Board of Review before January 31, 1994, for which the time for review had expired prior to such effective date without the Board of Review having made any recommendation thereon, remain lawful, valid, and effective, and the MWAA can perform such actions, including the issuance of bonds that have been previously authorized; it is

FURTHER ORDERED that this Court's January 31, 1994 Opinion and Order is modified as follows: actions

taken by the Board of Directors of the MWAA, which were submitted to the Board of Review before the effective date of this Court's Opinion and Order and which were still pending before the Board of Review on the effective date of such Opinion and Order but concerning which the Board of Review had not made any recommendation, and will not be making any recommendation, are lawful, valid, and effective, and the MWAA can perform such actions, including the issuance of bonds that have been previously authorized; it is

FURTHER ORDERED that the issuance of the Judgment and the effective date of the Court's Opinion and Order dated January 31, 1994 are stayed from the date thereof for a period of seventy-five (75) days provided that defendants file a Notice of Appeal in the United States Court of Appeals for the District of Columbia Circuit on or before February 22, 1994.

IT IS SO ORDERED.

February 15, 1994

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

[Filed Apr. 11, 1994]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-7036

JOHN W. HECHINGER, JR.; CRAIG H. BAAB;
CITIZENS FOR THE ABATEMENT OF AIRCRAFT NOISE, INC.

v.

METROPOLITAN WASHINGTON AIRPORT AUTHORITY;
BOARD OF REVIEW,

Appellants

BEFORE: Buckley, Williams and Rogers, Circuit Judges

ORDER

Upon consideration of appellants' motion for stay pending appeal, the opposition thereto and the reply; and the statement by the United States in support of the motion for stay pending appeal, it is

ORDERED that the district court's judgment and the effective date of the district court's January 31, 1994 opinion and order be stayed until fifteen days after this court renders its decision in this appeal. *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *D.C. Circuit Handbook of Practice and Internal Procedures* 66-67 (1994).

Per Curiam

FOR THE COURT:
RON GARVIN
Clerk

By: /s/ Cheri Carter
Deputy Clerk

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Article I, section 1:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, section 6, clause 2:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Article I, section 7, clause 2, in pertinent part:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.

Article I, section 7, clause 3:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Article II, section 1, in pertinent part:

> The executive Power shall be vested in a President of the United States of America.

Article II, section 2, clause 2, in pertinent part:

> [H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Article IV, section 3, clause 2:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SUBCHAPTER III—METROPOLITAN WASHINGTON AIRPORTS AUTHORITY

49 U.S.C. § 2451 (1988). Findings

The Congress finds that—

(1) the two federally owned airports in the metropolitan area of Washington, District of Columbia, constitute an important and growing part of the commerce, transportation, and economic patterns of the Commonwealth of Virginia, the District of Columbia, and the surrounding region;

(2) Baltimore/Washington International Airport, owned and operated by the State of Maryland, is an air transportation facility that provides service to the greater Metropolitan Washington region together with the two federally owned airports, and timely Federal-aid grants to Baltimore/Washington International Airport will provide additional capacity to meet the growing air traffic needs and to compete with other airports on a fair basis;

(3) the Federal Government has a continuing but limited interest in the operation of the two federally owned airports, which serve the travel and cargo needs of the entire Metropolitan Washington region as well as the District of Columbia as the national seat of government;

(4) operation of the Metropolitan Washington Airports by an independent local agency will facilitate timely improvements at both airports to meet the growing demand of interstate air transportation occasioned by the Airline Deregulation Act of 1978 (Public Law 95-504; 92 Stat. 1705);

(5) all other major air carrier airports in the United States are operated by public entities at the State, regional, or local level;

(6) any change in status of the two airports must take into account the interest of nearby communities, the traveling public, air carriers, general aviation, airport employees, and other interested groups, as well as the interests of the Federal Government and State governments involved;

(7) in recognition of a perceived limited need for a Federal role in the management of these airports and the growing local interest, the Secretary has recommended a transfer of authority from the Federal to the local/State level that is consistent with the management of major airports elsewhere in the Nation;

(8) an operating authority with representation from local jurisdictions, similar to authorities at all major airports in the United States, will improve communications with local officials and concerned residents regarding noise at the Metropolitan Washington Airports;

(9) a commission of congressional, State, and local officials and aviation representatives has recommended to the Secretary that transfer of the federally owned airports be as a unit to an independent authority to be created by the Commonwealth of Virginia and the District of Columbia; and

(10) the Federal interest in these airports can be provided through a lease mechanism which provides for local control and operation.

(Pub.L. 99-500, Title VI, § 6002, Oct. 18, 1986, 100 Stat. 1783-373; Pub.L. 99-591, Title VI, § 6002, Oct. 30, 1986, 100 Stat. 3341-376.)

§ 2452. Purpose

(a) In general

It is therefore declared to be the purpose of the Congress in this subchapter to authorize the transfer of operating responsibility under long-term lease of the two Metropolitan Washington Airport properties as a unit, including access highways and other related facilities, to a properly constituted independent airport authority created by the Commonwealth of Virginia and the District of Columbia, in order to achieve local control, management, operation, and the development of these important transportation assets.

(b) Inclusion of BWI not precluded

Nothing in this subchapter shall be construed to prohibit the Airports Authority and the State of Maryland from entering into an agreement whereby Baltimore/Washington International Airport may be made part of a regional airports authority, subject to terms and conditions agreed to by the Airports Authority, the Secretary, the Commonwealth of Virginia, the District of Columbia, and the State of Maryland.

(Pub.L. 99-500, Title VI, § 6003, Oct. 18, 1986, 100 Stat. 1783-374; Pub.L. 99-591, Title VI, § 6003, Oct. 30, 1986, 100 Stat. 3341-377.)

§ 2453. Definitions

In this subchapter;

(1) Administrator

The term "Administrator" means the Administrator of the Federal Aviation Administration.

(2) Airports Authority

The term "Airports Authority" means the Metropolitan Washington Airports Authority, a public body to be created by the Commonwealth of Virginia and the District of Columbia consistent with the requirements of section 2456 of this title.

(3) Employees

The term "employees" means all permanent Federal Aviation Administration personnel employed on the date the lease under section 2454 of this title takes effect by the Metropolitan Washington Airports, an organization within the Federal Aviation Administration.

(4) Metropolitan Washington Airports

The term "Metropolitan Washington Airports" means Washington National Airport and Washington Dulles International Airport.

(5) Secretary

The term "Secretary" means the Secretary of Transportation.

(6) Washington Dulles International Airport

The term "Washington Dulles International Airport" means the airport constructed under the Act entitled "An Act to authorize the construction, protection, operation, and maintenance of a public air-

port on or in the vicinity of the District of Columbia," approved September 7, 1950 (64 Stat. 770), and includes the Dulles Airport Access Highway and Right-of-way, including the extension between the Interstate Routes I-495 and I-66.

(7) Washington National Airport

The term "Washington National Airport" means the airport described in the Act entitled "An Act to provide for the administration of the Washington National Airport, and for other purposes," approved June 29, 1940 (54 Stat. 686).

(Pub.L. 99-500, Title VI, § 6004, Oct. 18, 1986, 100 Stat. 1783-374; Pub.L. 99-591, Title VI, § 6004, Oct. 30, 1986, 100 Stat. 3341-378.)

§ 2454. Lease of Metropolitan Washington Airports

(a) Authority to enter into lease

The Secretary is authorized to enter into a lease of the Metropolitan Washington Airports with the Airports Authority for a 50-year term and to enter into any related agreement necessary for the transfer of authority and property to the Airports Authority. Authority to enter into a lease and agreement under this section shall lapse two years after October 18, 1986.

(b) Payments

(1) Lease payments

The lease shall provide for the Airports Authority to pay to the general fund of the Treasury annually an amount, computed using the GNP Price Deflator, to equal $3,000,000 in 1987 dollars. The Secretary and the Airports Authority may renegotiate the level of lease payments attributable to inflation costs every ten years.

(2) Retirement obligations

(A) Discontinued service

Not later than one year after the lease takes effect, the Airports Authority shall pay to the Treasury of the United States, to be deposited to the credit of the Civil Service Retirement and Disability Fund, an amount determined by the Office of Personnel Management to represent the actual added costs incurred by the Fund due to discontinued service retirement under section 8336(d)(1) of Title 5 of employees who elect not to transfer to the Airports Authority.

(B) Unfunded liability

Not later than one year after the lease takes effect, the Airports Authority shall pay to the Treasury of the United States, to be deposited to the credit of the Civil Service Retirement and Disability Fund, an amount determined by the Office of Personnel Management to represent the present value of the difference between (i) the future cost of benefits payable from the Fund and due the employees covered under section 2457(e) of this title that are attributable to the period of employment following the date the lease takes effect, and (ii) the contributions made by the employees and the Airports Authority under section 2457(e) of this title. In determining the amount due, the Office of Personnel Management shall take into consideration the actual interest such amount can be expected to earn when invested in the Treasury of the United States.

(c) Minimum terms and conditions

The Airports Authority shall agree, at a minimum, to the following conditions and requirements in the lease:

(1) Operation of airports as a unit

The Airports Authority shall operate, maintain, protect, promote, and develop the Metropolitan Washington Airports as a unit and as primary airports serving the Metropolitan Washington area.

(2) Airport purposes

The real property constituting the Metropolitan Washington Airports shall, during the period of the lease, be used only for airport purposes. For the purposes of this paragraph, the term "airport purposes" means a use of property interests (other than a sale) for aviation business or activities, or for activities necessary or appropriate to serve passengers or cargo in air commerce, or for nonprofit, public use facilities. If the Secretary determines that any portion of the real property leased to the Airports Authority pursuant to this subchapter is used for other than airport purposes, the Secretary shall (A) direct that appropriate measures be taken by the Airports Authority to bring the use of such portion of real property in conformity with airport purposes, and (B) retake possession of such portion of real property if the Airports Authority fails to bring the use of such portion into a conforming use within a reasonable period of time, as determined by the Secretary.

(3) AIP requirements

The Airports Authority shall be subject to the requirements of section [49 U.S.C.A. § 2210(a)] and the assurances and conditions required of grant recipients under such Act [49 U.S.C.A. § 2201 et seq.] as of the date the lease takes effect. Notwithstanding section 511(a)(12) of such Act [49 U.S.C.A. § 2210(a)(12)], all revenues generated by the Metropolitan Washington Airports shall be ex-

pended for the capital and operating costs of such airports.

(4) Contracts

In acquiring by contract supplies or services for an amount estimated to be in excess of $200,000, or awarding concession contracts, the Airports Authority shall obtain, to the maximum extent practicable, full and open competition through the use of published competitive procedures. By a vote of seven members, the Airports Authority may grant exceptions to the requirements of this paragraph.

(5) Continuation of regulations

(A) In general

Except as provided in subparagraph (B) all regulations of the Metropolitan Washington Airports (14 C.F.R. 159) shall become regulations of the Airports Authority on the date the lease takes effect and shall remain in effect until modified or revoked by the Airports Authority in accordance with procedures of the Airports Authority.

(B) Exceptions

The following regulations shall cease to be in effect on the date the lease takes effect:

(i) section 159.59(a) of title 14, Code of Federal Regulations (relating to new-technology aircraft); and

(ii) section 159.191 of title 14, Code of Federal Regulations (relating to violations of Federal Aviation Administration regulations as Federal misdemeanors).

(C) Operations

The Airports Authority may not increase or decrease the number of instrument flight rule takeoffs and landings authorized by the High Density Rule (14 C.F.R. 93.121 et seq.) at Washington National Airport on October 18, 1986 and may not impose a limitation after the date the lease takes effect on the number of passengers taking off or landing at Washington National Airport.

(6) Transfer of rights, liabilities, and obligations

(A) In general

Except as specified in subparagraph (B) of this paragraph, the Airports Authority shall assume all rights, liabilities, and oblgations (tangible and incorporeal, present and executory) of the Metropolitan Washington Airports on the date the lease takes effect, including leases, permits, licenses, contracts, agreements, claims, tariffs, accounts receivable, accounts payable, and litigation relating to such rights and obligations, regardless whether judgment has been entered, damages awarded, or appeal taken. Before the date the lease takes effect, the Secretary shall also assure that the Airports Authority has agreed to cooperate in allowing representatives of the Attorney General and the Secretary adequate access to employees and records when needed for the performance of functions related to the period before the effectiveness of the lease. The Airports Authority shall assume responsibility for the Federal Aviation Administration's Master Plans for the Metropolitan Washington Airports.

(B) Exceptions

The procedure for disputes resolution contained in any contract entered into on behalf of the United States before the date the lease takes effect shall continue to govern the performance of the contract unless otherwise agreed to by the parties to the contract. Claims for monetary damages founded in tort, by or against the United States as the owner and operator of the Metropolitan Washington Airports, arising before the date the lease takes effect shall be adjudicated as if the lease had not been entered into.

(C) Payments into Employees' Compensation Fund

The Federal Aviation Administration shall remain responsible for reimbursing the Employees' Compensation Fund, pursuant to section 8147 of Title 5 for compensation paid or payable after the date the lease takes effect in accordance with chapter 81 of Title 5 with regard to any injury, disability, or death due to events arising before such date, whether or not a claim has been filed or is final on such date.

(D) Collective bargaining rights

The Airports Authority shall continue all collective bargaining rights enjoyed before the date the lease takes effect by employees of the Metropolitan Washington Airports.

(7) Audits

The Comptroller General of the United States may conduct periodic audits of the activities and transactions of the Airports Authority in accordance with generally accepted management principles, and under

such rules and regulations as may be prescribed by the Comptroller General. Any such audit shall be conducted at such place or places as the Comptroller General may deem appropriate. All books, accounts, records, reports, files, papers, and property of the Airports Authority shall remain in possession and custody of the Airports Authority.

(8) Code of ethics

The Airports Authority shall develop a code of ethics and financial disclosure in order to assure the integrity of all decisions made by its board of directors and employees.

(9) Restriction on use of certain revenues

Notwithstanding any other provision of law, no landing fee imposed for operating an aircraft or revenues derived from parking automobiles—

(A) at Washington Dulles International Airport may be used for maintenance or operating expenses (excluding debt service, depreciation, and amortization) at Washington National Airport; or

(B) at Washington National Airport may be used for maintenance or operating expenses (excluding debt service, depreciation, and amortization) at Washington Dulles International Airport.

(10) General aviation fees

The Airports Authority shall compute the fees and charges for landing general aviation aircraft at the Metropolitan Washington Airports on the same basis as the landing fees for air carrier aircraft, except that the Airports Authority may require a minimum landing fee not in excess of the landing fee for aircraft weighing 12,500 pounds.

(11) Other terms

The Secretary shall include such other terms and conditions applicable to the parties to the lease as are consistent with and carry out the provisions of this subchapter.

(d) Submission to Congress

The Secretary shall submit the lease entered into under this section to Congress. The lease may not take effect before the passage of (1) 30 days, or (2) 10 days in which either House of Congress is in session, whichever occurs later.

(e) Enforcement of lease provisions

The district courts of the United States shall have jurisdiction to compel the Airports Authority and its officers and employees to comply with the terms of the lease. An action may be brought on behalf of the United States by the Attorney General, or by any aggrieved party.

(Pub.L 99-500, Title VI, § 6005, Oct. 18, 1986, 100 Stat. 1783-375; Pub.L. 99-591, Title VI, § 6005, Oct. 30, 1986, 100 Stat. 3341-378.)

§ 2455. Capital improvements, construction, and rehabilitation

(a) Improvements

It is the sense of the Congress that the Airports Authority should—

(1) pursue the improvement, construction, and rehabilitation of the facilities at Washington Dulles International Airport and Washington National Airport simultaneously; and

(2) to the extent practicable, cause the improvement, construction, and rehabilitation proposed by the Secretary to be completed at both of such Airports

within 5 years after the earliest date on which the Airports Authority issues bonds under the authority required by section 2456 of this title for any such improvement, construction, or rehabilitation.

(b) Secretary's assistance

The Secretary shall assist the three airports serving the Washington, D.C. metropolitan area in planning for operational and capital improvements at those airports and shall accelerate consideration of applications for Federal financial assistance by whichever of the three airports is most in need of increasing airside capacity.

(Pub.L. 99-500, Title VI, § 6006, Oct. 18, 1986, 100 Stat. 1783-378; Pub.L. 99-591, Title VI, § 6006, Oct. 30, 1986, 100 Stat. 3341-381.)

§ 2456. Airports Authority

(a) Powers conferred by Virginia and the District of Columbia

The Airports Authority shall be a public body corporate and politic, having the powers and jurisdiction as are conferred upon it jointly by the legislative authority of the Commonwealth of Virginia and the District of Columbia or by either of the jurisdictions and concurred in by the legislative authority of the other jurisdiction, but at a minimum meeting the requirements of this section.

(b) Purpose

The Airports Authority shall be—

(1) independent of the Commonwealth of Virginia and its local government, the District of Columbia, and the Federal Government; and

(2) a political subdivision constituted solely to operate and improve both Metropolitan Washington

Airports as primary airports serving the Metropolitan Washington area.

(c) General authorities

The Airports Authority shall be authorized—

(1) to acquire, maintain, improve, operate, protect, and promote the Metropolitan Washington Airports for public purposes;

(2) to issue bonds from time to time in its discretion for public purposes, including the purposes of paying all or any part of the cost of airport improvements, construction, and rehabilitation, and the acquisition of real and personal property, including operating equipment for the airports, which bonds—

(A) shall not constitute a debt of either jurisdiction or a political subdivision thereof; and

(B) may be secured by the Airports Authority's revenues generally, or exclusively from the income and revenues of certain designated projects whether or not they are financed in whole or in part from the proceeds of such bonds;

(3) to acquire real and personal property by purchase, lease, transfer, or exchange, and to exercise such powers of eminent domain within the Commonwealth of Virginia as are conferred upon it by the Commonwealth of Virginia;

(4) to levy fees or other charges; and

(5) to make and maintain agreements with employee organizations to the extent that the Federal Aviation Administration is so authorized on October 18, 1986.

(d) Conflict-of-interest provisions

The Airports Authority shall be subject to a conflict-of-interest provision providing that members of the board and their immediate families may not be employed by or

otherwise hold a substantial financial interest in any enterprise that has or is seeking a contract or agreement with the Airports Authority or is an aeronautical, aviation services, or airport services enterprise that otherwise has interests that can be directly affected by the Airports Authority. Exceptions to requirements of the preceding sentence may be made by the official appointing a member at the time the member is appointed, if the financial interest is fully disclosed and so long as the member does not participate in board decisions that directly affect such interest. The Airports Authority shall include in its code developed under section 2454(c)(8) of this title the standards by which members will determine what constitutes a substantial financial interest and the circumstances under which an exception may be granted.

(e) Board of directors

(1) Appointment

The Airports Authority shall be governed by a board of directors of 11 members, as follows:

(A) five members shall be appointed by the Governor of Virginia;

(B) three members shall be appointed by the Mayor of the District of Columbia;

(C) two members shall be appointed by the Governor of Maryland; and

(D) one member shall be appointed by the President with the advice and consent of the Senate.

The Chairman shall be appointed from among the members by majority vote of the members and shall serve until replaced by majority vote of the members.

(2) Restrictions

Members shall (A) not hold elective or appointive political office, (B) serve without compensation other than for reasonable expenses incident to board functions, and (C) reside within the Washington Standard Metropolitan Statistical Area, except that the member appointed by the President shall not be required to reside in that area.

(3) Terms

Members shall be appointed to the board for a term of 6 years, except that of members first appointed—

(A) by the Governor of Virginia, 2 shall be appointed for 4 years and 2 shall be appointed for 2 years;

(B) by the Mayor of the District of Columbia, 1 shall be appointed for 4 years and 1 shall be appointed for 2 years; and

(C) by the Governor of Maryland, 1 shall be appointed for 4 years.

(4) Removal of Presidential appointees

A member of the board appointed by the President shall be subject to removal by the President for cause.

(5) Required number of votes

Seven votes shall be required to approve bond issues and the annual budget.

(f) Board of Review

(1) Composition

The board of directors shall be subject to review of its actions and to requests, in accordance with this subsection, by a Board of Review of the Air-

ports Authority. Such Board of Review shall be established by the board of directors and shall consist of the following, in their individual capacities, as representatives of users of the Metropolitan Washington Airports:

(A) two members of the Public Works and Transportation Committee and two members of the Appropriations Committee of the House of Representatives from a list provided by the Speaker of the House;

(B) two members of the Commerce, Science, and Transportation Committee and two members of the Appropriations Committee of the Senate from a list provided by the President pro tempore of the Senate; and

(C) one member chosen alternately from members of the House of Representatives and members of the Senate, from a list provided by the Speaker of the House or the President pro tempore of the Senate, respectively.

The members of the Board of Review shall elect a chairman. A member of the House of Representatives or the Senate from Maryland or Virginia and the Delegate from the District of Columbia may not serve on the Board of Review.

(2) Terms

Members of the Board of Review appointed under subparagraphs (A) and (B) of paragraph (1) shall be appointed for terms of six years, except that of the members first appointed, one member under each of subparagraphs (A) and (B) shall be appointed for a term of two years and one member under each of subparagraphs (A) and (B) shall be appointed for a term of four years. Members of the Board of Review appointed under subparagraph (C)

shall be appointed for terms of two years. A vacancy in the Board shall be filled in the same manner in which the original appointment was made. Any member appointed to fill a vacancy before the expiration of the term for which his or her predecessor was appointed shall be appointed only for the remainder of such term.

(3) Procedures

The Board of Review shall establish procedures for conducting its business. The procedures may include requirements for a quorum at meetings and for proxy voting. The Board shall meet at least once each year and shall meet at the call of the chairman or 3 members of the Board. Any decision of the Board of Review under paragraph (4) or (5) shall be by a vote of 5 members of the Board.

(4) Disapproval procedure

(A) Submission required

An action of the Airports Authority described in subparagraph (B) shall be submitted to the Board of Review at least 30 days (or at least 60 days in the case of the annual budget) before it is to be become effective.

(B) Actions affected

The following are the actions referred to in subparagraph (A):

(i) the adoption of an annual budget;

(ii) the authorization for the issuance of bonds;

(iii) the adoption, amendment, or repeal of a regulation;

(iv) the adoption or revision of a master plan, including any proposal for land acquisition; and

(v) the appointment of the chief executive officer.

(C) 30-day disapproval period

If the Board of Review does not disapprove an action within 30 days of its submission under this paragraph, the action may take effect. If the Board of Review disapproves any such action, it shall notify the Airports Authority and shall give reasons for the disapproval.

(D) Effect of disapproval

An action disapproved under this paragraph shall not take effect. Unless an annual budget for a fiscal year has taken effect in accordance with this paragraph, the Airports Authority may not obligate or expend any money in such fiscal year, except for (i) debt service on previously authorized obligations, and (ii) obligations and expenditures for previously authorized capital expenditures and routine operating expenses.

(5) Request for consideration of other matters

The Board of Review may request the Airports Authority to consider and vote, or to report, on any matter related to the Metropolitan Washington Airports. Upon receipt of such a request the Airports Authority shall consider and vote, or report, on the matter as promptly as feasible.

(6) Participation in meetings of Airports Authority

Members of the Board of Review may participate as nonvoting members in meetings of the board of the Airports Authority.

(7) Staff

The Board of Review may hire two staff persons to be paid by the Airports Authority. The Airports

Authority shall provide such clerical and support staff as the Board may require.

(8) Liability

A member of the Board of Review shall not be liable in connection with any claim, action, suit, or proceeding arising from service on the Board.

(g) Certain actions to be taken by regulation

Any action of the Airports Authority changing, or having the effect of changing, the hours of operation of or the type of aircraft serving either of the Metropolitan Washington Airports may be taken only by regulation of the Airports Authority.

(h) Limitation on authority

If the Board of Review established under subsection (f) of this section is unable to carry out its functions under this subchapter by reason of a judicial order, the Airports Authority shall have no authority to perform any of the actions that are required by paragraph [1] (f) (4) of this section to be submitted to the Board of Review.

(Pub.L. 99-500, Title VI, § 6007, Oct. 18, 1986, 100 Stat. 1783-379; Pub.L. 99-591, Title VI, § 6007, Oct. 30, 1986, 100 Stat. 3341-382.)

§ 2457. Federal employes at Metropolitan Washington Airports

(a) Employee protection

Not later than the date the lease under section 2454 of this title takes effect, the Secretary shall ensure that the Airports Authority has established arrangements to protect the employment interests of employees during

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[1] So in original. Probably should be "subsection".

the 5-year period beginning on such date. These arrangements shall include provisions—

(1) which ensure that the Airports Authority will adopt labor agreements in accordance with the provisions of subsection (b) of this section;

(2) for the transfer and retention of all employees who agree to transfer to the Airports Authority in their same positions for the 5-year period commencing on the date the lease under section 2454 of this title takes effect except in cases or reassignment, separation for cause, resignation, or retirement;

(3) for the payment by the Airports Authority of basic and premium pay to transferred employees, except in cases of separation for cause, resignation, or retirement, for 5 years commencing on the date the lease takes effect at or above the rates of pay in effect for such employees on such date;

(4) for credit during the 5-year period commencing on the date the lease takes effect for accrued annual and sick leave and seniority rights which have been accrued during the period of Federal employment by transferred employees retained by the Airports Authority; and

(5) for an offering of not less than one life insurance and three health insurance programs for transferred employees retained by the Airports Authority during the 5-year period beginning on the date the lease takes effect which are reasonably comparable with respect to employee premium cost and coverage to the Federal health and life insurance programs available to employees on the day before such date.

(b) Labor agreements

(1) Adoption

The Airports Authority shall adopt all labor agreements which are in effect on the date the lease under section 2454 of this title takes effect. Such agreements shall continue in effect for the 5-year period commencing on such date, unless the agreement provides for a shorter duration or the parties agree to the contrary before the expiration of that 5-year period. Such agreements shall be renegotiated during the 5-year period, unless the parties agree otherwise. Any labor-management negotiation impasse declared before the date the lease takes effect shall be settled in accordance with chapter 71 of Title 5.

(2) Continuation

The arrangements made pursuant to this section shall assure, during the 50-year lease term, the continuation of all collective bargaining rights enjoyed by transferred employees retained by the Airports Authority.

(c) Rights of terminated employees

Any transferred employee whose employment with the Airports Authority is terminated during the 5-year period beginning on the date the lease under section 2454 of this title takes effect shall be entitled, as a condition of any lease entered into in accordance with section 2454 of this title, to rights and benefits to be provided by the Airports Authority that are similar to those such employee would have had under Federal law if termination had occurred immediately before such date.

(d) Annual and sick leave

Any employee who transfers to the Airports Authority under this section shall not be entitled to lump-sum payment for unused annual leave under section 5551 of Title

5, but shall be credited by the Airports Authority with the unused annual leave balance on the date the lease under section 6005 takes effect, along with any unused sick leave balance on such date. During the 5-year period beginning on such date, annual and sick leave shall be earned at the same rates permitted on the day before such date, and observed official holidays shall be the same as those specified in section 6103 of Title 5.

(e) Civil Service retirement

Any Federal employee who transfers to the Airports Authority and who on the day before the date the lease under section 2454 of this title takes effect is subject to subchapter III, of chapter 83 of Title 5 or chapter 84 of such title shall, so long as continually employed by the Airports Authority without a break in service, continue to be subject to such subchapter or chapter, as the case may be. Employment by the Airports Authority without a break in continuity of service shall be considered to be employment by the United States Government for purposes of such subchapter and chapter. The Airports Authority shall be the employing agency fo purposes of such subchapter and chapter and shall contribute to the Civil Service Retirement and Disability Fund such sums as are required by such subchapter and chapter.

(f) Separated employees

An employee who does not transfer to the Airports Authority and who does not otherwise remain a Federal employee shall be entitled to all of the rights and benefits available under Federal law for separated employees, except that severance pay shall not be payable to an employee who does not accept an offer of employment from the Airports Authority of work substantially similar to that performed for the Federal Government.

(g) Access to records

The Airports Authority shall allow representatives of the Secretary adequate access to employees and employee records of the Airports Authority when needed for the performance of functions related to the period before the date the lease under section 2454 of this title takes effect. The Secretary shall provide the Airports Authority access to employee records of transferring employees for appropriate purposes.

(Pub.L. 99-500, Title VI, § 6008, Oct. 18, 1986, 100 Stat. 1783-382; Pub.L. 99-591, Title VI, § 6008, Oct. 30, 1986, 100 Stat. 3341-385.)

§ 2458. Relationship to and effect of other laws

(a) Other laws

In order to assure that the Airports Authority has the same proprietary powers and is subject to the same restrictions with respect to Federal law as any other airport except as otherwise provided in this subchapter, during the period that the lease authorized by section 2454 of this title is in effect—

(1) the Metropolitan Washington Airports shall be considered public airports for purposes of the Airport and Airway Improvement Act of 1982 (49 App. U.S.C. 2201 et seq.); [49 U.S.C.A. § 2201 et seq.]; and

(2) the Acts entitled "An Act to provide for the administration of the Washington National Airport, and for other purposes," approved June 29, 1940 (54 Stat. 686), "An Act to authorize the construction, protection, operation, and maintenance of a public airport in or in the vicinity of the District of Columbia," approved September 7, 1950 (64 Stat. 770), and "An Act making supplemental appropriations for the support of the Government for the fiscal year ending June 30, 1941, and for other purposes,"

approved October 9, 1940 (54 Stat. 1030), shall not apply to the operation of the Metropolitan Washington Airports, and the Secretary shall be relieved of all responsibility under those Acts.

(b) Inapplicability of certain laws

The Metropolitan Washington Airports and the Airports Authority shall not be subject to the requirements of any law solely by reason of the retention by the United States of the fee simple title to such airports or by reason of the authority of the Board of Review under subsection 2456(f) of this title.

(c) Police power

The Commonwealth of Virginia shall have concurrent police power authority over the Metropolitan Washington Airports, and the courts of the Commonwealth of Virginia may exercise jurisdiction over Washington National Airport.

(d) Planning

(1) In general

The authority of the National Capital Planning Commission under section 71d of Title 40 shall not apply to the Airports Authority.

(2) Consultation

The Airports Authority shall consult—

(A) with the National Capital Planning Commission and the Advisory Council on Historic Preservation before undertaking any major alterations to the exterior of the main terminal at Washington Dulles International Airport, and

(B) with the National Capital Planning Commission before undertaking development

that would alter the skyline of Washington National Airport when viewed from the opposing shoreline of the Potomac River or from the George Washington Parkway.

(e) Operation limitations

(1) High Density Rule

The Administrator may not increase the number of instrument flight rule takeoffs and landings authorized for air carriers by the High Density Rule (14 C.F.R. 93.121 et seq.) at Washington National Airport on October 18, 1986 and may not decrease the number of such takeoffs and landings except for reasons of safety.

(2) Annual passenger limitations

The Federal Aviation Administration air traffic regulation entitled "Modification of Allocation: Washington National Airport" (14 C.F.R. 93.124) shall cease to be in effect on October 18, 1986.

(Pub.L. 99-500, Title VI, § 6009, Oct. 18, 1986, 100 Stat. 1783-384; Pub.L. 99-591, Title VI, § 6009, Oct. 30, 1986, 100 Stat. 3341-387.)

§ 2459. Authority to negotiate extension of lease

The Secretary and the Airports Authority may at any time negotiate an extension of the lease entered into under section 2454(a) of this title.

(Pub.L. 99-500, Title VI, § 6010, Oct. 18, 1986, 100 Stat. 1783-385; Pub.L. 99-591, Title VI, § 6010, Oct. 30, 1986, 100 Stat. 3341-388.)

§ 2460. Separability

Except as provided in section 2456(h) of this title, if any provision of this subchapter or the application thereof

to any person or circumstance, is held invalid, the remainder of this subchapter and the application of such provision to other persons or circumstances shall not be affected thereby.

(Pub.L. 99-500, Title VI, § 6011, Oct. 18, 1986, 100 Stat. 1783-385; Pub.L. 99-591, Title VI, § 6011, Oct. 30, 1986, 100 Stat. 3341-388.)

§ 2461. Nonstop flights

Perimeter rule

An air carrier may not operate an aircraft nonstop in air transportation between Washington National Airport and another airport that is more than 1,250 statute miles away from Washington National Airport.

(Pub.L. 99-500, Title VI, § 6012, Oct. 18, 1986, 100 Stat. 1783-385; Pub.L. 99-591, Title VI, § 6012, Oct. 30, 1986, 100 Stat. 3341-388.)

TITLE VII—AIR TRANSPORTATION

Sec. 7001. Short Title.

This title may be cited as the "Metropolitan Washington Airports Act Amendments of 1991".

Sec. 7002. Board of Review

(a) COMPOSITION.—Section 6007(f)(1) of the Metropolitan Washington Airports Act of 1986 (49 U.S.C. App. 2456(f)(1)) is amended to read as follows:

"(1) COMPOSITION.—The board of directors shall be subject to review of its actions and to requests, in accordance with this subsection, by a Board of Review of the Airports Authority. The Board of Review shall be established by the board of directors to represent the interests of users of the Metropolitan Washington Airports and shall be composed of 9 members appointed by the board of directors as follows:

"(A) 4 individuals from a list provided by the Speaker of the House of Representatives.

"(B) 4 individuals from a list provided by the President pro tempore of the Senate.

"(C) 1 individual chosen alternately from a list provided by the Speaker of the House of Representatives and from a list provided by the President pro tempore of the Senate.

In addition to the recommendations on a list provided under this paragraph, the board of directors may request additional recommendations.".

(b) TERMS AND QUALIFICATIONS.—Section 6007(f)(2) of such Act is amended to read as follows:

"(2) TERMS, VACANCIES, AND QUALIFICATIONS.—

"(A) TERMS.—Members of the Board of Review appointed under paragraphs (1)(A)

and (1)(B) shall be appointed for terms of 6 years. Members of the Board of Review appointed under paragraph (1)(C) shall be appointed for terms of 2 years. A member may serve after the expiration of that member's term until a successor has taken office.

"(B) VACANCIES.—A vacancy in the Board of Review shall be filled in the manner in which the original appointment was made. Any member appointed to fill a vacancy occurring before the expiration of the term for which the member's predecessor was appointed shall be appointed only for the remainder of such term.

"(C) QUALIFICATIONS.—Members of the Board of Review shall be individuals who have experience in aviation matters and in addressing the needs of airport users and who themselves are frequent users of the Metropolitan Washington Airports. A member of the Board of Review shall be a registered voter of a State other than Maryland, Virginia, or the District of Columbia.

"(D) EFFECT OF MORE THAN 4 VACANCIES.—At any time that the Board of Review established under this subsection has more than 4 vacancies and lists have been provided for appointments to fill such vacancies, the Airports Authority shall have no authority to perform any of the actions that are required by paragraph (4) to be submitted to the Board of Review.".

(c) PROCEDURES.—Section 6007(f)(3) of such Act is amended by inserting "and for the selection of a Chairman" after "proxy voting".

(d) REVIEW PROCEDURE.—

(1) ACTIONS SUBJECT TO REVIEW.—Section 6007 (f)(4)(B) of such Act is amended—

(A) by inserting "and any amendments thereto" before the semicolon at the end of clause (i);

(B) by inserting "and an annual plan for issuance of bonds and any amendments to such plan" before the semicolon at the end of clause (ii);

(C) in clause (iv) by striking ". including any proposal for land acquisition; and" and inserting a semicolon;

(D) by striking the period at the end of clause (v) and inserting a semicolon; and

(E) by adding at the end the following new clauses:

"(vi) the award of a contract (other than a contract in connection with the issuance or sale of bonds which is executed within 30 days of the date of issuance of the bonds) which has been approved by the board of directors of the Airports Authority;

"(vii) any action of the board of directors approving a terminal design or airport layout or modification of such design or layout; and

"(viii) the authorization for the acquisition or disposal of land and the grant of a long-term easement.".

(2) RECOMMENDATIONS.—Section 6007(f)(4) of such Act is amended by striking subparagraphs (C) and (D) and inserting the following new subparagraphs:

"(C) RECOMMENDATIONS.—The Board of Review may make to the board of directors recommendations regarding an action within either (i) 30 calendar days of its submission under this paragraph; or (ii) 10 calander days (excluding Saturdays, Sundays, and holidays, and any day on which neither House of Congress is in session because of an adjournment sine die, a recess of more than 3 days, or an adjournment of more than 3 days) of its submission under this paragraph; whichever period is longer. Such reccommendations may include a recommendation that the action not take effect. If the Board of Review does not make a recommendation in the applicable review period under this subparagraph or if at any time in such review period the Board of Review decides that it will not make a recommendation on an action, the action may take effect.

"(D) EFFECT OF RECOMMENDATION.—

"(i) RESPONSE.—An action with respect to which the Board of Review has made a recommendation in accordance with subparagraph (C) may only take effect if the board of directors adopts such recommendation or if the board of directors has evaluated and responded, in writing, to the Board of Review with respect to such recommendation and transmits such action, evaluation, and response to Congress in accordance with clause (ii) and the 60-calendar day period described in clause (ii) expires.

"(ii) NONADOPTION OF RECOMMENDATION.—If the board of directors does not

adopt a recommendation of the Board of Review regarding an action, the board of directors shall transmit to the Speaker of the House of Representatives and the President of the Senate a detailed description of the action, the recommendation of the Board of Review regarding the action, and the evaluation and response of the board of directors to such recommendation, and the action may not take effect until the expiration of 60 calendar days (excluding Saturdays, Sundays, and holidays, and any day on which neither House of Congress is in session because of an adjournment sine die, a recess of more than 3 days, or an adjournment of more than 3 days) beginning on the day on which the board of directors makes such transmission to the Speaker of the House of Representatives and the President of the Senate.

"(E) LIMITATION ON EXPENDITURES.—Unless an annual budget for a fiscal year has taken effect in accordance with this paragraph, the Airjorts Authority may not obligate or expend any money in such fiscal year, except for (i) debt service on previously authorized obligations, and (ii) obligations and expenditures for previously authorized capital expenditures and routine operating expenses.".

(3) CONFORMING AMENDMENT.—Section 6007 (f)(4) of such Act is further amended by striking "DISAPPROVAL PROCEDURE.—" and inserting "REVIEW PROCEDURE.—".

(e) CONGRESSIONAL DISAPPROVAL PROCEDURE.—Section 6007(f) of such Act is amended by redesignating paragraphs (5), (6), (7), and (8) as paragraphs (6),

(7), (8), and (9), respectively, and by inserting after paragraph (4) the following new paragraph:

"(5) CONGRESSIONAL DISAPPROVAL PROCEDURE.—

"(A) IN GENERAL.—This paragraph is enacted by Congress—

"(i) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such these provisions are deemed a part of the rule of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions described by this paragraph; and they supersede other rules only to the extent that they are inconsistent therewith; and

"(ii) with full recognition of the constitutional right of either House to change the rule (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

"(B) RESOLUTION DEFINED.—For the purpose of this paragraph, the term 'resolution' means only a joint resolution, relating to an action of the board of directors transmitted to Congress in accordance with paragraph (4)(D)(ii), the matter after the resolving clause of which is as follows: "That the Congress disapproves of the action of the board of directors of the Metropolitan Washington Airports Authority described as follows: .', the blank space therein being appropriately filled. Such term does not include a resolution which specifies more than one action.

"(C) REFERRAL.—A resolution with respect to a board of director's action shall be referred to the Committee on Public Works and Transportation of the House of Representatives, or the Committee on Commerce, Science and Technology of the Senate, by the Speaker of the House of Representatives or the President of the Senate, as the case may be.

"(D) MOTION TO DISCHARGE.—If the committee to which a resolution has been referred has not reported it at the end of 20 calendar days after its introduction, it is in order to move to discharge the committee from further consideration of that joint resolution or any other resolution with respect to the board of directors action which has been referred to the committee.

"(E) RULES WITH RESPECT TO MOTION.—A motion to discharge may be made only by an individual favoring the resolution, is highly privileged (except that it may not be made after the committee has reported a resolution with respect to the same action), and debate thereon shall be limited to not more than 1 hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to. Motions to postpone shall be decided without debate.

"(F) EFFECT OF MOTION.—If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same acion.

"(G) SENATE PROCEDURE.—

"(i) MOTION TO PROCEED.—When the committee of the Senate has reported, or has been discharged from further consideration of, a resolution, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

"(ii) LIMITATION ON DEBATE.—Debate in the Senate on the resolution shall be limtied to not more than 10 hours, which shall be divided equally between those favoring and those opposing the resolution. A motion further to limit debate is not debatable. An amendment to, or motion to recommit, the resolution is not in order, and it is not in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

"(iii) NO DEBATE ON CERTAIN MOTIONS. In the Senate, motions to postpone made with respect to the consideration of a resolution and motions to proceed to the consideration of other business shall be decided without debate.

"(iv) APPEALS.—Appeals from the decisions of the Chair relating to the application of the rules of the Senate to the procedure relating to a resolution shall be decided without debate.

"(H) EFFECT OF ADOPTION OF RESOLUTION BY OTHER HOUSE.—If, before the passage by 1 House of a joint resolution of that House, that House receives from the other House a joint resolution, then the following procedures shall apply:

"(i) The joint resolution of the other House shall not be referred to a committee and may not be considered in the House receiving it, except in the case of final passage as provided in clause (ii)(I).

"(ii) With respect to a joint resolution described in clause (i) of the House receiving the joint resolution—

"(I) the procedure in that House shall be the same as if no joint resolution had been received from the House; but

"(II) the vote on final passage shall be on the joint resolution of the other House.

Upon disposition of the joint resolution received from the other House, it shall no longer be in order to consider the joint resolution that originated in the receiving House.".

(f) CONFLICTS OF INTEREST; REMOVAL FOR CAUSE.—Section 6007(f) of such Act is further amended by adding at the end the following new paragraphs:

"(10) CONFLICTS OF INTEREST.—In every contract or agreement to be made or entered into, or accepted by or on behalf of the Airports Authority, there shall be inserted an express condition that no member of a Board of Review shall be admitted to

any share or part of such contract or agreement, or to any benefit to arise thereupon.

"(11) REMOVAL.—A member of the Board of Review shall be subject to removal only for cause by a two-thirds vote of the board of directors.".

(g) LIMITATION ON AUTHORITY.—Section 6007(h) of such Act is amended by inserting "thereafter" before "shall have no".

(h) REVIEW OF CONTRACTS.—Section 6007 of such Act is further amended by adding at the end the following new subsection:

"(i) REVIEW OF CONTRACTING PROCEDURES.—The Comptroller General shall review contracts of the Airports Authority to determine whether such contracts were awarded by procedures which follow sound Government contracting principles and are in compliance with section 6005(c)(4) of this title. The Comptroller General shall submit periodic reports of the conclusions reached as a result of such review to the Committee on Public Works and Transportation of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate.".

Sec. 7003. Amendment of Lease.

The Secretary of Transportation may amend the lease entered into with the Metropolitan Washington Airports Authority under section 6005(a) of the Metropolitan Washington Airports Authority Act of 1986 to secure the Airports Authority's consent to the conditions relating to the new Board of Review to be established pursuant to the amendments made by this Act.

Sec. 7004. Termination of Existing Board of Review and Establishment of New Board of Review.

(a) TERMINATION OF EXISTING BOARD AND ESTABLISHMENT OF NEW BOARD.—Except as provided in sub-

section (b), the Board of Review of the Metropolitan Washington Airports Authority in existence on the day before the date of the enactment of this Act shall terminate on such date of enactment and the board of directors of such Airports Authority shall establish a new Board of Review in accordance with the Metropolitan Washington Airports Act of 1986, as amended by this Act.

(b) PROTECTION OF CERTAIN ACTIONS.—The provisions of section 6007(h) of the Metropolitan Washington Airports Act (49 U.S.C. App. 2456(h)) in effect on the day before the date of the enactment of this Act shall apply only to those actions specified in section 6007(f)(4)(B) of such Act that would have been submitted to the Board of Review of the Metropolitan Washington Airports Authority on or after June 17, 1991, the date on which the Board of Review of the Airports Authority was declared unable to carry out certain of its functions pursuant to judicial order. Actions taken by the Airports Authority and submitted to the Board of Review pursuant to section 6007(f)(4) of such Act prior to June 17, 1991, and not disapproved, shall remain in effect and shall not be set aside solely by reason of a judicial order invalidating certain functions of the Board of Review.

(c) LIMITATION ON AUTHORITY OF AIRPORTS AUTHORITY.—The Metropolitan Washington Airports Authority shall have no authority to perform any of the actions that are required by section 6007(f)(4) of the Metropolitan Washington Airports Act, as amended by this Act, to be submitted to the Board of Review after the date of the enactment of this Act until the board of directors of the Airports Authority establishes a new Board of Review in accordance with such Act and appoints the 9 members of the Board of Review.

SUBCHAPTER III—METROPOLITAN WASHINGTON AIRPORTS AUTHORITY

§ 2451. Findings

The Congress finds that—

(1) the two, federally owned airports in the metropolitan area of Washington, District of Columbia, constitute an important and growing part of the commerce, transportation, and economic patterns of the Commonwealth of Virginia, the District of Columbia, and the surrounding region;

(2) Baltimore/Washington International Airport, owned and operated by the State of Maryland, is an air transportation facility that provides service to the greater Metropolitan Washington region together with the two federally owned airports, and timely Federal-aid grants to Baltimore/Washington International Airport will provide additional capacity to meet the growing air traffic needs and to compete with other airports on a fair basis;

(3) the Federal Government has a continuing but limited interest in the operation of the two federally owned airports, which serve the travel and cargo needs of the entire Metropolitan Washington region as well as the District of Columbia as the national seat of government;

(4) operation of the Metropolitan Washington Airports by an independent local agency will facilitate timely improvements at both airports to meet the growing demand of interstate air transportation occasioned by the Airline Deregulation Act of 1978 (Public Law 95-504; 92 Stat. 1705);

(5) all other major air carrier airports in the United States are operated by public entities at the State, regional, or local level;

(6) any change in status of the two airports must take into account the interest of nearby communities,

the traveling public, air carriers, general aviation, airport employees, and other interested groups, as well as the interests of the Federal Government and State governments involved;

(7) in recognition of a perceived limited need for a Federal role in the management of these airports and the growing local interest, the Secretary has recommended a transfer of authority from the Federal to the local/State level that is consistent with the management of major airports elsewhere in the Nation;

(8) an operating authority with representation from local jurisdictions, similar to authorities at all major airports in the United States, will improve communications with local officials and concerned residents regarding noise at the Metropolitan Washington Airports;

(9) a commission of congressional, State, and local officials and aviation representatives has recommended to the Secretary that transfer of the federally owned airports be as a unit to an independent authority to be created by the Commonwealth of Virginia and the District of Columbia; and

(10) the Federal interest in these airports can be provided through a lease mechanism which provides for local control and operation.

(Pub.L. 99-500, Title VI, § 6002, Oct. 18, 1986, 100 Stat. 1783-373; Pub.L. 99-591, Title VI, § 6002, Oct. 30, 1986, 100 Stat. 3341-376.)

§ 2452. Purpose

(a) In general

It is therefore declared to be the purpose of the Congress in this subchapter to authorize the transfer of operating responsibility under long-term lease of the two Metropolitan Washington Airport properties as a unit,

including access highways and other related facilities, to a properly constituted independent airport authority created by the Commonwealth of Virginia and the District of Columbia, in order to achieve local control, management, operation, and development of these important transportation assets.

(b) Inclusion of BWI not precluded

Nothing in this subchapter shall be construed to prohibit the Airports Authority and the State of Maryland from entering into an agreement whereby Baltimore/Washington International Airport may be made part of a regional airports authority, subject to terms and conditions agreed to by the Airports Authority, the Secretary, the Commonwealth of Virginia, the District of Columbia, and the State of Maryland.

(Pub.L. 99-500, Title VI, § 6003, Oct. 18, 1986, 100 Stat. 1783-374; Pub.L. 99-591, Title VI, § 6003, Oct. 30, 1986, 100 Stat. 3341-377.)

§ 2453. Definitions

In this subchapter—

(1) Administrator

The term "Administrator" means the Administrator of the Federal Aviation Administration.

(2) Airports Authority

The term "Airports Authority" means the Metropolitan Washington Airports Authority, a public body created by the Commonwealth of Virginia and the District of Columbia consistent with the requirements of section 2456 of this title.

(3) Employees

The term "employees" means all permanent Federal Aviation Administration personnel employed on

the date the lease under section 2454 of this title takes effect by the Metropolitan Washington Airports, an organization within the Federal Aviation Administration.

(4) Metropolitan Washington Airports

The term "Metropolitan Washington Airports" means Washington National Airport and Washington Dulles International Airport.

(5) Secretary

The term "Secretary" means the Secretary of Transportation.

(6) Washington Dulles International Airport

The term "Washington Dulles International Airport" means the airport constructed under the Act entitled "An Act to authorize the construction, protection, operation, and maintenance of a public airport on or in the vicinity of the District of Columbia," approved September 7, 1950 (64 Stat. 770), and includes the Dulles Airport Access Highway and Right-of-way, including the extension between the Interstate Routes I-495 and I-66.

(7) Washington National Airport

The term "Washington National Airport" means the airport described in the Act entitled "An Act to provide for the administration of the Washington National Airport, and for other purposes," approved June 29, 1940 (54 Stat. 686).

(Pub.L. 99-500, Title VI, § 6004, Oct. 18, 1986, 100 Stat. 1783-374; Pub.L. 99-591, Title VI, § 6004, Oct. 30, 1986, 100 Stat. 3341-378.)

§ 2454. Lease of Metropolitan Washington Airports

(a) Authority to enter into lease

The Secretary is authorized to enter into a lease of the Metropolitan Washington Airports with the Airports Au-

thority for a 50-year term and to enter into any related agreement necessary for the transfer of authority and property to the Airports Authority. Authority to enter into a lease and agreement under this section shall lapse two years after October 18, 1986.

(b) Payments

(1) Lease payments

The lease shall provide for the Airports Authority to pay to the general fund of the Treasury annually an amount, computed using the GNP Price Deflator, to equal $3,000,000 in 1987 dollars. The Secretary and the Airports Authority may renegotiate the level of lease payments attributable to inflation costs every ten years.

(2) Retirement obligations

(A) Discontinued service

Not later than one year after the lease takes effect, the Airports Authority shall pay to the Treasury of the United States, to be deposited to the credit of the Civil Service Retirement and Disability Fund, an amount determined by the Office of Personnel Management to represent the actual added costs incurred by the Fund due to discontinued service retirement under section 8336(d)(1) of Title 5 of employees who elect not to transfer to the Airports Authority.

(B) Unfunded liability

Not later than one year after the lease takes effect, the Airports Authority shall pay to the Treasury of the United States, to be deposited to the credit of the Civil Service Retirement and Disability Fund, an amount determined by the Office of Personnel Management to represent the present value of the difference between (i) the future cost of benefits payable from the Fund

and due the employees covered under section 2457(e) of this title that are attributable to the period of employment following the date the lease takes effect, and (ii) the contributions made by the employees and the Airports Authority under section 2457(e) of this tile. In determining the amount due, the Office of Personnel Management shall take into consideration the actual interest such amount can be expected to earn when invested in the Treasury of the United States.

(c) Minimum terms and conditions

The Airports Authority shall agree, at a minimum, to the following conditions and requirements in the lease:

(1) Operation of airports as a unit

The Airports Authority shall operate, maintain, protect, promote, and develop the Metropolitan Washington Airports as a unity and as primary airports serving the Metropolitan Washington area.

(2) Airport purposes

The real property constituting the Metropolitan Washington Airports shall, during the period of the lease, be used only for airport purposes. For the purposes of this paragraph, the term "airport purposes" means a use of property interests (other than a sale) for aviation business or activities, or for activities necessary or appropriate to serve passengers or cargo in air commerce, or for nonprofit, public use facilities. If the Secretary determines that any portion of the real property leased to the Airports Authority pursuant to this subchapter is used for other than airport purposes, the Secretary shall (A) direct that appropriate measures be taken by the Airports Authority to bring the use of such portion of real property in conformity with airport pur-

poses, and (B) retake possession of such portion of real property if the Airports Authority fails to bring the use of such portion into a conforming use within a reasonable period of time, as determined by the Secretary.

(3) AIP requirements

The Airports Authority shall be subject to the requirements of section [49 U.S.C.A. § 2210(a)] and the assurances and conditions required of grant recipients under such Act [49 U.S.C.A. § 2201 et seq.] as of the date the lease takes effect. Notwithstanding section 511(a)(12) of such Act [49 U.S.C.A. § 2201(a)(12)], all revenues generated by the Metropolitan Washington Airports shall be expended for the capital and operating costs of such airports.

(4) Contracts

In acquiring by contract supplies or services for an amount estimated to be in excess of $200,000, or awarding concession contracts, the Airports Apthority shall obtain, to the maximum extent practicable, full and open competition through the use of published competitive procedures. By a vote of seven members, the Airports Authority may grant exceptions to the requirements of this paragraph.

(5) Continuation of regulations

(A) In general

Except as provided in subparagraph (B), all regulations of the Metropolitan Washington Airports (14 C.F.R. part 159) shall become regulations of the Airports Authority on the date the lease takes effect and shall remain in effect until modified or revoked by the Airports Authority in accordance with procedures of the Airports Authority.

(B) Exceptions

The following regulations shall cease to be in effect on the date the lease takes effect:

(i) section 139.39(a) of title 14, Code of Federal Regulations (relating to new-technology aircraft); and

(ii) section 159.191 of title 14, Code of Federal Regulations (relating to violations of Federal Aviation Administration regulations as Federal misdemeanors).

(C) Operations

The Airports Authority may not increase or decrease the number of instrument flight rule takeoffs and landings authorized by the High Density Rule (14 C.F.R. 93.121 et seq.) at Washington National Airport on October 18, 1986 and may not impose a limitation after the date the lease takes effect on the number of passengers taking off or landing at Washington National Airport.

(6) Transfer of rights, liabilities, and obligations

(A) In general

Except as specified in subparagraph (B) of this paragraph, the Airports Authority shall assume all rights, liabilities, and obligations (tangible and incorporeal, present and executory) of the Metropolitan Washington Airports on the date the lease takes effect, including leases, permits, licenses, contracts, agreements, claims, tariffs, accounts receivable, accounts payable, and litigation relating to such rights and obligations, regardless whether judgment has been entered, damages awarded, or appeal taken. Before the date the lease takes effect, the Secre-

tary shall also assure that the Airports Authority has agreed to cooperate in allowing representatives of the Attorney General and the Secretary adequate access to employees and records when needed for the performance of functions related to the period before the effectiveness of the lease. The Airports Authority shall assume responsibility for the Federal Aviation Administration's Master Plans for the Metropolitan Washington Airports.

(B) Exceptions

The procedure for disputes resolution contained in any contract entered into on behalf of the United States before the date the lease takes effect shall continue to govern the performance of the contract unless otherwise agreed to by the parties to the contract. Claims for monetary damages founded in tort, by or against the United States as the owner and operator of the Metropolitan Washington Airports, arising before the date the lease takes effect shall be adjudicated as if the lease had not been entered into.

(C) Payments into Employees' Compensation Fund

The Federal Aviation Administration shall remain responsible for reimbursing the Employees' Compensation Fund, pursuant to section 8147 of Title 5 for compensation paid or payable after the date the lease takes effect in accordance with chapter 81 of Title 5 with regard to any injury, disability, or death due to events arising before such date, whether or not a claim has been filed or is final on such date.

(D) Collective bargaining rights

The Airports Authority shall continue all collective bargaining rights enjoyed before the date the lease takes effect by employees of the Metropolitan Washington Airports.

(7) Audits

The Comptroller General of the United States may conduct periodic audits of the activites and transactions of the Airports Authority in accordance with generally accepted management principles, and under such rules and regulations as may be prescribed by the Comptroller General. Any such audit shall be conducted at such place or places as the Comptroller General may deem appropriate. All books, accounts, records, reports, files, papers, and property of the Airports Authority shall remain in possession and custody of the Airports Authority.

(8) Code of ethics

The Airports Authority shall develop a code of ethics and financial disclosure in order to assure the integrity of all decisions made by its board of directors and employees.

(9) Restriction on use of certain revenues

Notwithstanding any other provision of law, no landing fee imposed for operating an aircraft or revenues derived from parking automobiles—

(A) at Washington Dulles International Airport may be used for maintenance or operating expenses (excluding debt service, depreciation, and amortization) at Washington National Airport; or

(B) at Washington National Airport may be used for maintenance or operating expenses (excluding debt service, depreciation, and amorti-

zation) at Washington Dulles International Airport.

(10) General aviation fees

The Airports Authority shall compute the fees and charges for landing general aviation aircraft at the Metropolitan Washington Aiports on the same basis as the landing fees for air carrier aircraft, except that the Airports Authority may require a minimum landing fee not in excess of the landing fee for aircraft weighing 12,500 pounds.

(11) Other terms

The Secretary shall include such other terms and conditions applicable to the parties to the lease as are consistent with and carry out the provisions of this subchapter.

(d) Submission to Congress

The Secretary shall submit the lease entered into under this section to Congress. The lease may not take effect before the passage of (1) 30 days, or (2) 10 days in which either House of Congress is in session, whichever occurs later.

(e) Enforcement of lease provisions

The district courts of the United States shall have jurisdiction to compel the Airports Authority and its officers and employees to comply with the terms of the lease. An action may be brought on behalf of the United States by the Attorney General, or by any aggrieved party.

(Pub.L. 99-500, Title VI § 6005, Oct. 18, 1986, 100 Stat. 1783-375; Pub.L. 99-591, Title VI, § 6005, Oct. 30, 1986, 100 Stat. 3341-378.)

§ 2455. Capital improvements, construction, and rehabilitation

(a) Improvements

It is the sense of the Congress that the Airports Authority should—

(1) pursue the improvement, construction, and rehabilitation of the facilities at Washington Dulles International Airport and Washingotn National Airport simultaneously; and

(2) to the extent practicable, cause the improvement, construction, and rehabilitation proposed by the Secretary to be completed at both of such Airports within 5 years after the earliest date on which the Airports Authority issues bonds under the authority required by section 2456 of this title for any such improvement, construction, or rehabilitation.

(b) Secretary's assistance

The Secretary shall assist the three airports serving the Washington, D.C. metropolitan area in planning for operational and capital improvements at those airports and shall accelerate consideration of applications for Federal financial assistance by whichever of the three airports is most in need of increasing airside capacity.

(Pub.L. 99-500, Title VI, § 6006, Oct. 18, 1986, 100 Stat. 1783-378; Pub.L. 99-591, Title VI, § 6006, Oct. 30, 1986, 100 Stat. 3341-381.)

§ 2456. Airports Authority

(a) Powers conferred by Virginia and the District of Columbia

The Airports Authority shall be a public body corporate and politic, having the powers and jurisdiction as are conferred upon it jointly by the legislative authority of the Commonwealth of Virginia and the District of

Columbia or by either of the jurisdictions and concurred in by the legislative authority of the other jurisdiction, but at a minimum meeting the requirements of this section.

(b) Purpose

The Airports Authority shall be—

(1) independent of the Commonwealth of Virginia and its local governments, the District of Columbia, and the Federal Government; and

(2) a political subdivision constituted solely to operate and improve both Metropolitan Washington Airports as primary airports serving the Metropolitan Washington area.

(c) General authorities

The Airports Authority shall be authorized—

(1) to acquire, maintain, improve, operate, protect, and promote the Metropolitan Washington Airports for public purposes;

(2) to issue bonds from time to time in its discretion for public purposes, including the purposes of paying all or any part of the cost of airport improvements, construction, and rehabilitation, and the acquisition of real and personal property, including operating equipment for the airports, which bonds—

(A) shall not constitute a debt of either jurisdiction or a political subdivision thereof; and

(B) may be secured by the Airports Authority's revenues generally, or exclusively from the income and revenues of certain designated projects whether or not they are financed in whole or part from the proceeds of such bonds;

(3) to acquire real and personal property by purchase, lease, transfer, or exchange, and to exercise such powers of eminent domain within the Commonwealth of Virginia as are conferred upon it by the Commonwealth of Virginia;

(4) to levy fees or other charges; and

(5) to make and maintain agreements with employee organizations to the extent that the Federal Aviation Administration is so authorized on October 18, 1986.

(d) Conflict-of-interest provisions

The Airports Authority shall be subject to a conflict-of-interest provision providing that members of the board and their immediate families may not be employed by or otherwise hold a substantial financial interest in any enterprise that has or is seeking a contract or agreement with the Airports Authority or is an aeronautical, aviation services, or airport services enterprise that otherwise has interests that can be directly affected by the Airports Authority. Exceptions to requirements of the preceding sentence may be made by the official appointing a member at the time the member is appointed, if the financial interest is fully disclosed and so long as the member does not participate in board decisions that directly affect such interest. The Airports Authority shall include in its code developed under section 2454(c)(8) of this title the standards by which members will determine what constitutes a substantial financial interest and the circumstances under which an exception may be granted.

(e) Board of directors

(1) Appointment

The Airports Authority shall be governed by a board of directors of 11 members, as follows:

(A) five members shall be appointed by the Governor of Virginia;

(B) three members shall be appointed by the Mayor of the District of Columbia;

(C) two members shall be appointed by the Governer of Maryland; and

(D) one member shall be appointed by the President with the advice and consent of the Senate.

The Chairman shall be appointed from among the members by majority vote of the members and shall serve until replaced by majority vote of the members.

(2) Restrictions

Members shall (A) not hold elective or appointive political office, (B) serve without compensation other than for reasonable expenses incident to board functions, and (C) reside within the Washington Standard Metropolitan Statistical Area, except that the member appointed by the President shall not be required to reside in that area.

(3) Terms

Members shall be appointed to the board for a term of 6 years, except that of members first appointed—

(A) by the Governor of Virginia, 2 shall be appointed for 4 years and 2 shall be appointed for 2 years;

(B) by the Mayor of the District of Columbia, 1 shall be appointed for 4 years and 1 shall be appointed for 2 years; and

(C) by the Governor of Maryland, 1 shall be appointed for 4 years.

(4) Removal of Presidential appointees

A member of the board appointed by the President shall be subject to removal by the President for cause.

(5) Required number of votes

Seven votes shall be required to approve bond issues and the annual budget.

(f) Board of Review

(1) Composition

The board of directors shall be subject to review of its actions and to requests, in accordance with this subsection, by a Board of Review of the Airports Authority. The Board of Review shall be established by the board of directors to represent the interests of users of the Metropolitan Washington Airports and shall be composed of 9 members appointed by the board of directors as follows:

(A) 4 individuals from a list provided by the Speaker of the House of Representatives.

(B) 4 individuals from a list provided by the President pro tempore of the Senate.

(C) 1 individual chosen alternately from a list provided by the Speaker of the House of Representatives and from a list provided by the President pro tempore of the Senate.

In addition to the recommendations on a list provided under this paragraph, the board of directors may request additional recommendations.

(2) Terms, vacancies, and qualifications

(A) Terms

Members of the Board of Review appointed under paragraphs (1)(A) and (1)(B) shall be

appointed for terms of 6 years. Members of the Board of Review appointed under paragraph (1)(C) shall be appointed for terms of 2 years. A member may serve after the expiration of that member's term until a successor has taken office.

(B) Vacancies

A vacancy in the Board of Review shall be filled in the manner in which the original appointment was made. Any member appointed to fill a vacancy occurring before the expiration of the term for which the member's predecessor was appointed shall be appointed only for the remainder of such term.

(C) Qualifications

Members of the Board of Review shall be individuals who have experience in aviation matters and in addressing the needs of airport users and who themselves are frequent users of the Metropolitan Washington Airports. A member of the Board of Review shall be a registered voter of a State other than Maryland, Virginia, or the District of Columbia.

(D) Effect of more than 4 vacancies

At any time that the Board of Review established under this subsection has more than 4 vacancies and lists have been provided for appointments to fill such vacancies, the Airports Authority shall have no authority to perform any of the actions that are required by paragraph (4) to be submitted to the Board of Review.

(3) Procedures

The Board of Review shall establish procedures for conducting its business. The procedures may include requirements for a quorum at meetings and for proxy voting and for the selection of a Chairman. The Board shall meet at least once each year and shall meet at the call of the chairman or 3 members of the Board. Any decision of the Board of Review under paragraph (4) or (5) shall be by a vote of 5 members of the Board.

(4) Review procedure

(A) Submission required

An action of the Airports Authority described in subparagraph (B) shall be submitted to the Board of Review at least 30 days (or at least 60 days in the case of the annual budget) before it is to become effective.

(B) Actions affected

The following are the actions referred to in subparagraph (A):

(i) the adoption of an annual budget and any amendments thereto;

(ii) the authorization for the issuance of bonds and an annual plan for issuance of bonds and any amendments to such plan;

(iii) the adoption, amendment, or repeal of a regulation;

(iv) the adoption or revision of a master plan;

(v) the appointment of the chief executive officer;

(vi) the award of a contract (other than a contract in connection with the issuance or sale of bonds which is executed within 30 days of the date of issuance of the bonds) which has been approved by the board of directors of the Airports Authority;

(vii) any action of the board of directors approving a terminal design or airport layout or modification of such design or layout; and

(viii) the authorization for the acquisition or disposal of land and the grant of a long-term easement.

(C) Recommendations

The Board of Review may make to the board of directors recommendations regarding an action within either (i) 30 calendar days of its submission under this paragraph; or (ii) 10 calendar days (excluding Saturdays, Sundays, and holidays, and any day on which neither House of Congress is in session because of an adjournment sine die, a recess of more than 3 days, or an adjournment of more than 3 days) of its submission under this paragraph; whichever period is longer. Such recommendations may include a recommendation that the action not take effect. If the Board of Review does not make a recommendation in the applicable review period under this subparagraph or if at any time in such review period the Board of Review decides that it will not make a recommendation on an action, the action may take effect.

(D) Effect of recommendation

(i) Response

An action with respect to which the Board of Review has made a recommendation in accordance with subparagraph (C) may only take effect if the board of directors adopts such recommendation or if the board of directors has evaluated and responded, in writing, to the Board of Review with respect to such recommendation and transmits such action, evaluation, and response to Congress in accordance with clause (ii) and the 60-calendar day period described in clause (ii) expires.

(ii) Nonadoption of recommendation

If the board of directors does not adopt a recommendation of the Board of Review regarding an action, the board of directors shall transmit to the Speaker of the House of Representatives and the President of the Senate a detailed description of the action, the recommendation of the Board of Review regarding the action, and the evaluation and response of the board of directors to such recommendation, and the action may not take effect until the expiration of 60 calendar days (excluding Saturdays, Sundays, and holidays, and any day on which neither House of Congress is in session because of an adjournment sine die, a recess of more than 3 days, or an adjournment of more than 3 days) beginning on the day on which the board of directors makes such transmission to the Speaker of the House of Representatives and the President of the Senate.

(E) Limitation on expenditures

Unless an annual budget for a fiscal year has taken effect in accordance with this paragraph, the Airports Authority may not obligate or expend any money in such fiscal year, except for (i) debt service on previously authorized obligations, and (ii) obligations and expenditures for previously authorized capital expenditures and routine operating expenses.

(5) Congressional disapproval procedure

(A) In general

This paragraph is enacted by Congress—

(i) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such these provisions are deemed a part of the rule of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions described by this paragraph; and they supersede other rules only to the extent that they are inconsistent therewith; and

(ii) with full recognition of the constitutional right of either House to change the rule (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

(B) Resolution defined

For the purpose of this paragraph, the term "resolution" means only a joint resolution, relating to an action of the board of directors transmitted to Congress in accordance with

paragraph (4)(D)(ii), the matter after the resolving clause of which is as follows: "That the Congress disapproves of the action of the board of directors of the Metropolitan Washington Airports Authority described as follows: ——", the blank space therein being appropriately filled. Such term does not include a resolution which specifies more than one action.

(C) Referral

A resolution with respect to a board of director's action shall be referred to the Committee on Publics Works and Transportation of the House of Representatives, or the Committee on Commerce, Science and Technology of the Senate, by the Speaker of the House of Representatives or the President of the Senate, as the case may be.

(D) Motion to discharge

If the committee to which a resolution has been referred has not reported it at the end of 20 calendar days after its introduction, it is in order to move to discharge the committee from further consideration of that joint resolution or any other resolution with respect to the board of directors action which has been referred to the committee.

(E) Rules with respect to motion

A motion to discharge may be made only by an individual favoring the resolution, is highly privileged (except that it may not be made after the committee has reported a resolution with respect to the same action), and debate thereon shall be limited to not more than 1 hour, to be divided equally between those favoring and those opposing the resolution. An amendment

to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to. Motions to postpone shall be decided without debate.

(F) Effect of motion

If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same action.

(G) Senate procedure

(i) Motion to proceed

When the committee of the Senate has reported, or has been discharged from further consideration of, a resolution, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(ii) Limitation on debate

Debate in the Senate on the resolution shall be limited to not more than 10 hours, which shall be divided equally between those favoring and those opposing the resolution. A motion further to limit debate is not debatable. An amendment to, or motion to recommit, the resolution is not in order, and it is not in order to

move to reconsider the vote by which the resolution is agreed to or disagreed to.

(iii) No debate on certain motions

In the Senate, motions to postpone made with respect to the consideration of a resolution and motions to proceed to the consideration of other business shall be decided without debate.

(iv) Appeals

Appeals from the decisions of the Chair relating to the application of the rules of the Senate to the procedure relating to a resolution shall be decided without debate.

(H) Effect of adoption of resolution by other house

If, before the passage by 1 House of a joint resolution of that House, that House receives from the other House a joint resolution, then the following procedures shall apply:

(i) The joint resolution of the other House shall not be referred to a committee and may not be considered in the House receiving it, except in the case of final passage as provided in clause (ii)(I).

(ii) With respect to a joint resolution described in clause (i) of the House receiving the joint resolution—

(I) the procedure in that House shall be the same as if no joint resolution had been received from the other House; but

(II) the vote on final passage shall be on the joint resolution of the other House.

Upon disposition of the joint resolution received from the other House, it shall no longer be in order to consider the joint resolution that originated in the receiving House.

(6) Request for consideration of other matters

The Board of Review may request the Airports Authority to consider and vote, or to report, on any matter related to the Metropolitan Washington Airports. Upon receipt of such a request the Airports Authority shall consider and vote, or report, on the matter as promptly as feasible.

(7) Participation in meetings of Airports Authority

Members of the Board of Review may participate as nonvoting members in meetings of the board of the Airports Authority.

(8) Staff

The Board of Review may hire two staff persons to be paid by the Airports Authority. The Airports Authority shall provide such clerical and support staff as the Board may require.

(9) Liability

A member of the Board of Review shall not be liable in connection with any claim, action, suit, or proceeding arising from service on the Board.

(10) Conflicts of interest

In every contract or agreement to be made or entered into, or accepted by or on behalf of the Airports Authority, there shall be inserted an express condition that no member of a Board of Review shall be admitted to any share or part of such contract or agreement, or to any benefit to arise thereupon.

(11) Removal

A member of the Board of Review shall be subject to removal only for cause by a two-thirds vote of the board of directors.

(g) Certain actions to be taken by regulation

Any action of the Airports Authority changing, or having the effect of changing, the hours of operation of or the type of aircraft serving either of the Metropolitan Washington Airports may be taken only by regulation of the Airports Authority.

(h) Limitation on authority

If the Board of Review established under subsection (f) of this section is unable to carry out its functions under this subchapter by reason of a judicial order, the Arports Authority thereafter shall have no authority to perform any of the actions that are required by paragraph [1] (f)(4) of this section to be submitted to the Board of Review.

(i) Review of contracting procedures

The Comptroller General shall review contracts of the Airports Authority to determine whether such contracts were awarded by procedures which follow sound Government contracting principles and are in compliance with section 2454(c)(4) of this title. The Comptroller General shall submit periodic reports of the conclusions reached as a result of such review to the Committee on Public Works and Transportation of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate.

(Pub.L. 99-500, Title VI, § 6007, Oct. 18, 1986, 100 Stat. 1783-379; Pub.L. 99-591, Title VI, § 6007, Oct. 30, 1986, 100 Stat. 3341-382; Pub.L. 102-240, Title VII, § 7002, Dec. 18, 1991, 105 Stat. 2197.)

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[1] So in original. Probably should be "subsection".

§ 2457. Federal employees at Metropolitan Washington Airports

(a) Employee protection

Not later than the date the lease under section 2454 of this title takes effect, the Secretary shall ensure that the Airports Authority has established arrangements to protect the employment interests of employees during the 5-year period beginning on such date. These arrangements shall include provisions—

(1) which ensure that the Airports Authority will adopt labor agreements in accordance with the provisions of subsection (b) of this section;

(2) for the transfer and retention of all employees who agree to transfer to the Airports Authority in their same positions for the 5-year period commencing on the date the lease under section 2454 of this title takes effect except in cases of reassignment, separation for cause, resignation, or retirement;

(3) for the payment by the Airports Authority of basic and premium pay to transferred employees, except in cases of separation for cause, resignation, or retirement, for 5 years commencing on the date the lease takes effect at or above the rates of pay in effect for such employees on such date;

(4) for credit during the 5-year period commencing on the date the lease takes effect for accrued annual and sick leave and seniority rights which have been accrued during the period of Federal employment by transferred employees retained by the Airports Authority; and

(5) for an offering of not less than one life insurance and three health insurance programs for transferred employees retained by the Airports Authority during the 5-year period beginning on the date

the lease takes effect which are reasonably comparable with respect to employee premium cost and coverage to the Federal health and life insurance programs available to employees on the day before such date.

(b) Labor agreements

(1) Adoption

The Airports Authority shall adopt all labor agreements which are in effect on the date the lease under section 2454 of this title takes effect. Such agreements shall continue in effect for the 5-year period commencing on such date, unless the agreement provides for a shorter duration or the parties agree to the contrary before the expiration of that 5-year period. Such agreements shall be renegotiated during the 5-year period, unless the parties agree otherwise. Any labor-management negotiation impasse declared before the date the lease takes effect shall be settled in accordance with chapter 71 of Title 5.

(2) Continuation

The arrangements made pursuant to this section shall assure, during the 50-year lease term, the continuation of all collective bargaining rights enjoyed by transferred employees retained by the Airports Authority.

(c) Rights of terminated employees

Any transferred employee whose employment with the Airports Authority is terminated during the 5-year period beginning on the date the lease under section 2454 of this title takes effect shall be entitled, as a condition of any lease entered into in accordance with section 2454 of this title, to rights and benefits to be provided by the Airports Authority that are similar to those such employees would have had under Federal law if termination had occurred immediately before such date.

(d) Annual and sick leave

Any employee who transfers to the Airports Authority under this section shall not be entitled to lump-sum payment for unused annual leave under section 5551 of Title 5, but shall be credited by the Airports Authority with the unused annual leave balance on the date the lease under section 6005 takes effect, along with any unused sick leave balance on such date. During the 5-year period beginning on such date, annual and sick leave shall be earned at the same rates permitted on the day before such date, and observed official holidays shall be the same as those specified in section 6103 of Title 5.

(e) Civil Service retirement

Any Federal employee who transfers to the Airports Authority and who on the day before the date the lease under section 2454 of this title takes effect is subject to subchapter III of chapter 83 of Title 5 or chapter 84 of such title shall, so long as continually employed by the Airports Authority without a break in service, continue to be subject to such subchapter or chapter, as the case may be. Employment by the Airports Authority without a break in continuity of service shall be considered to be employment by the United States Government for purposes of such subchapter and chapter. The Airports Authority shall be the employing agency for purposes of such subchapter and chapter and shall contribute to the Civil Service Retirement and Disability Fund such sums as are required by such subchapter and chapter.

(f) Separated employees

An employee who does not transfer to the Airports Authority and who does not otherwise remain a Federal employee shall be entitled to all of the rights and benefits available under Federal law for separated employees, except that severance pay shall not be payable to an employee who does not accept an offer of employment from the Airports Authority of work substantially similar to that performed for the Federal Government.

(g) Access to records

The Airports Authority shall allow representatives of the Secretary adequate access to employees and employee records of the Airports Authority when needed for the performance of functions related to the period before the date the lease under section 2454 of this title takes effect. The Secretary shall provide the Airports Authority access to employee records of transferring employees for appropriate purposes.

(Pub.L. 99-500, Title VI, § 6008, Oct. 18, 1986, 100 Stat. 1783-382; Pub.L. 99-591, Title VI, § 6008, Oct. 30, 1986, 100 Stat. 3341-385.)

§ 2458. Relationship to and effect of other laws

(a) Other laws

In order to assure that the Airports Authority has the same proprietary powers and is subject to the same restrictions with respect to Federal law as any other airport except as otherwise provided in this subchapter, during the period that the lease authorized by section 2454 of this title is in effect—

(1) the Metropolitan Washington Airports shall be considered public airports for purposes of the Airport and Airway Improvement Act of 1982 (49 App. U.S.C. 2201 et seq.); [49 U.S.C.A. § 2201 et seq.]; and

(2) the Acts entitled "An Act to provide for the administration of the Washington National Airport, and for other purposes", approved June 29, 1940 (54 Stat. 686), "An Act to authorize the construction, protection, operation, and maintenance of a public airport in or in the vicinity of the District of Columbia", approved September 7, 1950 (64 Stat. 770), and "An Act making supplemental appropriations for the support of the Government for the fiscal year ending June 30, 1941, and for other

purposes", approved October 9, 1940 (54 Stat. 1030), shall not apply to the operation of the Metropolitan Washington Airports, and the Secretary shall be relieved of all responsibility under those Acts.

(b) Inapplicability of certain laws

The Metropolitan Washington Airports and the Airports Authority shall not be subject to the requirements of any law solely by reason of the retention by the United States of the fee simple title to such airports or by reason of the authority of the Board of Review under subsection 2456(f) of this title.

(c) Police power

The Comomnwealth of Virginia shall have concurrent police power authority over the Metropolitan Washington Airports, and the courts of the Commonwealth of Virginia may exercise jurisdiction over Washington National Airport.

(d) Planning

(1) In general

The authority of the National Capital Planning Commission under section 71d of Title 40 shall not apply to the Airports Authority.

(2) Consultation

The Airports Authority shall consult—

(A) with the National Capital Planning Commission and the Advisory Council on Historic Preservation before undertaking any major alterations to the exterior of the main terminal at Washington Dulles International Airport, and

(B) with the National Capital Planning Commission before undertaking development

that would alter the skyline of Washington National Airport when viewed from the opposing shoreline of the Potomac River or from the George Washington Parkway.

(e) Operation limitations

(1) High Density Rule

The Administrator may not increase the number of instrument flight rule takeoffs and landings authorized for air carriers by the High Density Rule (14 C.F.R. 93.121 et seq.) at Washington National Airport on October 18, 1986 and may not decrease the number of such takeoffs and landings except for reasons of safety.

(2) Annual passenger limitations

The Federal Aviation Administration air traffic regulation entitled "Modification of Allocation: Washington National Airport" (14 C.F.R. 93.124) shall cease to be in effect on October 18, 1986.

(Pub.L. 99-500, Title VI, § 6009, Oct. 18, 1986, 100 Stat. 1783-384; Pub.L. 99-591, Title VI, § 6009, Oct. 30, 1986, 100 Stat. 3341-387.)

§ 2459. Authority to negotiate extension of lease

The Secretary and the Airports Authority may at any time negotiate an extension of the lease entered into under section 2454(a) of this title.

(Pub.L. 99-500, Tile VI, § 6010, Oct. 18, 1986, 100 Stat. 1783-385; Pub.L. 99-591, Title VI, § 6010, Oct. 30, 1986, 100 Stat. 3341-388.)

§ 2460. Separability

Except as provided in section 2456(h) of this title, if any provision of this subchapter or the application thereof to any person or circumstance, is held invalid, the re-

mainder of this subchapter and the application of such provision to other persons or circumstances shall not be affected thereby.

(Pub.L. 99-500, Title VI, § 6011, Oct. 18, 1986, 100 Stat. 1783-385; Pub.L. 99-591, Title VI, § 6011, Oct. 30, 1986, 100 Stat. 3341-388.)

§ 2461. Nonstop flights

Perimeter rule

An air carrier may not operate an aircraft nonstop in air transportation between Washington National Airport and another airport that is more than 1,250 statute miles away from Washington National Airport.

(Pub.L. 99-500, Title VI, § 6012, Oct. 18, 1986, 100 Stat. 1783-385; Pub.L. 99-591, Title VI, § 6012, Oct. 30, 1986, 100 Stat. 3341-388.)

1985 SESSION

VIRGINIA ACTS OF ASSEMBLY—CHAPTER 598

An Act to create a regional airport authority to acquire Washington National Airport and Washington Dulles International Airport from the federal government.

[S 711]

Approved Apr. 03, 1985

Be it enacted by the General Assembly of Virginia:

1. § 1. Definitions.—For the purposes of this act the following terms and phrases shall have the following meanings:

"Authority Facilities" shall mean any or all airport facilities now existing or hereafter acquired or constructed or caused to be constructed by the Authority under this act, and together with any or all buildings, improvements, additions, extensions, replacements, appurtenances, lands, rights in land, water rights, air rights, franchises, machinery equipment, furnishings, landscaping, easements, utilities, approaches, roadways and other facilities necessary or desirable in connection therewith or incidental thereto, including the existing Dulles Airport Access Road and its right-of-way, acquired or constructed by the Authority;

"Authority" shall mean the Metropolitan Washington Airports Authority hereinafter created or, if the Authority shall be abolished, the board, body, or commission or agency succeeding to the principal functions thereof or upon whom the powers given by this act to the Authority shall be conferred by law;

"Cost" shall mean, as applied to Authority Facilities, the cost of acquisiton of all lands, structures, rights-of-way, franchises, easements and other property rights and interests, the cost of lease payments, the cost of construction, the cost of demolishing, removing or relocating any

buildings or structures on lands acquired, including the cost of acquiring any lands to which such buildings or structures may be moved or relocated, the cost of any extensions, enlargements, additions and improvements, the cost of all labor, materials, machinery and equipment, financing charges, interest on all bonds prior to and during construction and, if deemed advisable by the Authority, for a period not exceeding one year after completion of such construction, the cost of engineering, financial and legal services, plans, specifications, studies, surveys, estimates of cost and of revenues, other expenses necessary or incident to determining the feasibility or practicability of constructng the Authority Facilities, administrative expenses, provisions for working capital, reserves for interest and for extensions, enlargements, additions and improvements, the cost of bond insurance and other devices designed to enhance the cerditworthiness of the bonds, and such other expenses as may be necessary or incidential to the construction of the Authority Facilities, the financing of such construction and the placing of the Authority Facilities in operation. Any obligation or expenses incurred by the Commonwealth of any agency thereof, with the approval of the Authority, for studies, surveys, borings, preparation of plans and specifications or other work or materials in connection with the construction of the Authority Faciilties may be regarded as part of the cost of the Authority Facilities and may be reimbursed to the Commonwealth or such agency out of any funds available therefor or the proceeds of the revenue bonds issued for such Authority Facilities as hereinafter authorized.

"Bonds" or "revenue bonds" shall mean bonds and notes or refunding bonds and notes or bond anticipation notes or other obligations of the Authority issued under the provisions of this act.

§ 2. Metropolitan Washington Airports Authority created.—There is hereby created the Metropolitan Washington Airports Authority, hereafter referred to as the Au-

thority, a public body corporate and politic and independent of all other bodies, having the powers and jurisdiction hereinafter enumerated, and such other and additional powers as shall be conferred upon it by the legislative authorities of both the Commonwealth of Virginia and the District of Columbia.

§ 3. Metropolitan Washington Airports Authority.—The Metropolitan Washington Airports Authority created by this act is hereby authorized, when similarly authorized by the District of Columbia, to acquire from the United States of America, by lease or otherwise, the two airports known as Washington National Airport and Washington Dulles International Airport and all related properties now administered by Metropolitan Washington Airports, an agency of the Federal Aviation Administration of the United States Department of Transportation, but only with the approval of the Governor of Virginia. Subject to such gubernatorial approval, general consent is hereby given to conditions imposed by the Congress of the United States on such acquisitions that are not inconsistent with this act.

§ 4. Membership; terms; officers.—A. The Authority shall consist of eleven members: five appointed by the Governor of the Commonwealth of Virginia, three appointed by the Mayor of the District of Columbia, two appointed by the Governor of the State of Maryland, and one appointed by the President of the United States. Members representing the Commonwealth of Virginia shall be subject to confirmation by the Virginia General Assembly. For the purposes of doing business, six members shall constitute a quorum. The failure of a single appointing official to appoint one or more members, as herein provided, shall not impair the Authority's creation when the other conditions thereof have been met.

B. Members shall (i) not hold elective or appointive public office, (ii) serve without compensation, and (iii) reside within the Washington Standard Metropolitan

Statistical Area, except that the member appointed by the President of the United States shall not be required to reside in that area. The members of the Authority shall be entitled to reimbursement for their expenses incurred in attendance upon the meetings of the Authority or while otherwise engaged in the discharge of their duties.

C. Appointments to the Authority shall be for a period of six years. However, initial appointments shall be made as follows: each jurisdiction shall appoint one member for a full six-year term, a second member for a four-year term and in the case of the Commonwealh and the District of Columbia, a third member for a two-year term. The Governor of Virginia shall make the final two Virginia initial appointments for one two-year and one four-year term. The President shall make initial and subequent appointments for six-year terms.

D. Seven affirmative votes shall be required to approve bond issues and the annual budget of the Authority.

E. Each member may be removed or suspended from office only for cause, and in accordance with the laws of the jurisdiction from which he is appointed.

F. The Authority shall annually elect one of its members as chairman and another as vice-chairman and shall also elect annually a secretary and a treasurer, or a secretary-treasurer, who may or may not be members of the Authority, and prescribe their powers and duties. The Authority may also appoint from its staff an assistant secretary and an assistant treasurer, or an assistant secretary-treasurer, who shall, in addition to other duties, discharge such functions of the secretary and the treasurer.

G. The members of the Authority shall continue to serve until their successors shall be duly appointed. Any person appointed to fill a vacancy shall serve for the un-

expired term. Any member of the Authority shall be eligible for reappointment for one term.

H. The members of the Authority shall not be personally liable for any act done or action taken in their capacities as members of the Authority, nor shall they be personally liable for any bond, note or other evidence of indebtedness issued by the Authority.

§ 5. Powers and duties of the Authority.—For the purpose of acquiring, operating, maintaining, developing, promoting and protecting Washington National Airport and Washington Dulles International Airport together as primary airports for public purposes serving the metropolitan Washington area, the Authority shall have all necessary or convenient powers including, but not limited to, the power:

1. To adopt and amend by-laws for the regulation of its affairs and the conduct of its business;

2. To plan, establish, operate, develop, construct, enlarge, maintain, equip, operate and protect the airports;

3. To adopt and amend regulations to carry out the powers granted by this section;

4. To adopt an official seal and alter the same at its pleasure;

5. To appoint one or more advisory committees;

6. To issue revenue bonds of the Authority for any of its purposes, payable solely from the fees and revenues pledged for their payment, and to refund its bonds, all as provided in this act;

7. To borrow money on a short-term basis and issue from time to time its notes therefor payable on such terms, conditions or provisions as it may deem advisable;

8. To fix, revise, charge, and collect rates, fees, rentals and other charges for the use of the airports;

9. To acquire, hold and dispose of real and personal property in the exercise of its powers and the performance of its duties under this act;

10. To employ, in its discretion, consulting engineers, attorneys, accountants, construction and financial experts, superintendents, managers, and such other employees and agents as may be necessary, and to fix their compensation and benefits. However, the Authority shall comply with any Act of Congress concerning former employees of the Federal Aviation Administration and Metropolitan Washington Airports;

11. To sue and be sued in its own name, plead and be impleaded;

12. To construct or permit the construction of commercial and other facilities upon the airport property on terms established by the Authority and consistent with the purposes of this act;

13. To make and enter into all contracts and agreements necessary or desirable to the performance of its duties, the proper operation of the airports and the furnishing of services to the travelling public and airport users, and such contracts shall be exclusive or limited when it is necessary to further the public safety, improve the quality of service, avoid duplication of services, or conserve airport property and the airport environment;

14. To apply for, receive and accept such payments, appropriations, grants, gifts, loans, advances, and other funds, properties, and services as may be transferred or made available to it by the United States government or any other public or private entity or individual; and

15. To do all acts and things necessary or convenient to carry out the powers expressly granted in this act.

§ 6. Authority rules and regulations.—The Authority shall have the power to adopt, amend, and repeal rules and regulations pertaining to the use, maintenance and

operation of its facilities and governing the conduct of persons and organizations using its facilities.

Unless the Authority shall by unanimous vote of all members present determine that an emergency exists, the Authority shall, prior to the adoption of any rule or regulation or alteration, amendment or modification thereof:

a. Make such rule, regulation, alteration, amendment, or modification in convenient form available for public inspection in the office of the Authority for at least ten days;

b. Publish a notice in a newspaper or newspapers of general circulation in the political subdivision where the Authority's Facilities are located declaring the Authority's intention to consider adopting such rule, regulation, alteration, amendment, or modification and informing the public that the Authority will hold a public hearing at which any person may appear and be heard for or against the adoption of such rule or regulation or such alteration, amendment, or modification, on a day and at a time to be specified in the notice, after the expiration of at least ten days from the day of the publication thereof; and

c. Hold the public hearing on the day and at the time specified in such notice or any adjournment thereof, and hear persons appearing for or against such rule, regulation, alteration, amendment or modification.

The Authority's rules and regulations shall be available for public inspection in the Authority's principal office.

The Authority's rules and regulations relating to:

a. Air operations and motor vehicle traffic, including but not limited to, motor vehicle speed limits and the location of and payment for public parking;

b. Access to and use of Authority Facilities, including but not limited to solicitation, handbilling, picketing and the conduct of commercial activities; and

c. Aircraft operation and maintenance;

shall have the force and effect of law, as shall any other rule or regulation of the Authority which shall contain a determination by the Authority that it is necessary to accord the same force and effect of law in the public interest; provided, however, that with respect to motor vehicle traffic rudes and regulations, the Authority shall obtain the approval of the traffic engineer or comparable official of the political subdivision in which such rules or regulations are to be enforced. The violation of any rule or regulation of the Authority relating to motor vehicle traffic shall be tried and punished in the same manner as if it had been committed on the public roads of the political subdivision in which such violation occurred; all other violations of the Authority's rules and regulations having the force and effect of law shall be punishable as misdemeanors.

§ 7. Police powers.—The Authority's employees meeting the minimum requirements of the Criminal Justice Officers Training Standards Commission may be given special police power by any of the circuit courts of the political subdivisions in which the Authority's Facilities are located. The authority conferred upon such special policemen shall be exercised only upon the Authority's Facilities and shall be in all terms consistent with the requirements of Chapter 3 of Title 15.1 of the Code of Virginia.

Such special policemen shall have all powers vested in police officers under Chapter 3 of Title 15.1 of the Code of Virginia and shall be responsible upon the Authority's Facilities for enforcing the Authority's rules and regulations and all other applicable statutes, ordinances, rules, and regulations of this Commonwealth and political subdivisions, agencies, and instrumentalities thereof.

Such special policemen may issue summons to appear, or arrest on view or on information without warrant as permitted by law, and conduct before any court of competent jurisdiction any person violating any rule or reguation.

For the purpose of enforcing such statutes, ordinances, rules and regulations, the court or courts having jurisdiction for the trial of criminal offenses of the political subdivision wherein the offense was committed shall have jurisdiction to try a person charged with the violation of any such statutes, ordinances, rules and regulations.

§ 8. Operation of foreign trade zone.—The Authority is authorized and empowered to establish, operate and maintain a foreign trade zone and otherwise to expedite and encourage foreign commerce.

§ 9. Acquisition of property; eminent domain.—A. The Authority is hereby authorized to acquire by purchase, lease or grant such additional lands, structures, property, rights, rights-of-way, franchises, easements and other interests in lands as it may deem necessary or convenient for construction and operation of the airports, upon such terms and at such prices as may be considered by it to be reasonable and can be agreed upon between it and the owner thereof.

B. Any political subdivision of the Commonwealth, all or a part of which is located within sixty miles of Authority Facilities is authorized to provide services, to donate real or personal property and to make appropriations to the Authority for the acquisition, construction, maintenance, and operation of the Authority Facilities. Any such political subdivision is hereby authorized to issue its bonds in the manner provided in the Public Finance Act or in any applicable municipal charter for the purpose of providing funds to be appropriated to the Authority. The Authority may agree to assume, or reimburse such a political subdivision for any indebtedness

incurred by such political subdivision with respect to facilities conveyed by it to the Authority. With the consent of the governing body of the political subdivision any such agreement may be made subordinate to the Authority's indebtedness to others.

C. The Authority established hereunder is hereby granted full power to exercise the right of eminent domain in the acquisition of any lands, easements, privileges or other property interests which are necessary for airport and landing field purposes, including the right to acquire, by eminent domain, aviation easements over lands or water outside the boundaries of its airports or landing fields where necessary in the interests of safety for aircraft to provide unobstructed air space for the landing and taking off of aircraft utilizing its airports and landing fields even though such aviation easement be inconsistent with the continued use of such land, or inconsistent with the maintenance, preservation and renewal of any structure or any tree or other vegetation standing or growing on the land at the time of such acquisition. Proceedings for the acquisition of such lands, easements and privileges by condemnation may be instituted and conducted in the name of the Authority in accordance with Title 25 of the Code of Virginia.

§ 10. Revenue bonds.—The Authority is hereby authorized to provide resolution for the issuance, at one time or from time to time, of revenue bonds of the Authority for the purpose of paying all or any part of the cost of Authority Facilities, including the refunding of federal appropriations not reimbursed to the United States Treasury by the Metropolitan Washington Airports. The principal of and the interest on such bonds shall be payable solely from the funds herein provided for such payment. The bonds of each issue shall be dated, shall mature at such time or times not exceeding forty years from their date or dates, as may be determined by the Authority, and may be subject to redemption or repur-

chase before maturity, at the option of the Authority, at such price or prices and under such terms and conditions as may be fixed by the Authority prior to the issuance of the bonds. The bonds may bear interest payable at such time or times and at such rate or rates as determined by the Authority or as determined in such manner as the Authority may provide, including the determination by agents designated by the Authority under guidelines established by it. The Authority shall determine the form and the manner of execution of the bonds, including any interest coupons to be attached thereto, and shall fix the denomination or denominations of the bonds and the place or places of payment of principal and interest, which may be at any bank or trust company within or without the Commonwealth of Virginia. In case any officer whose signature or a facsimile of whose signature shall appear on any bonds or coupons shall cease to be such officer before the delivery of such bonds, such signature or such facsimile shall nevertheless be valid and sufficient for all purposes the same as if he had remained in office until such delivery. Notwithstanding any other provision of this act or any recitals in any bonds issued under the provisions of this section, all such bonds shall be deemed to be negotiable instruments under the laws of the Commonwealth of Virginia. The bonds may be issued in coupon or in registered form, or both, as the Authority may determine and provision may be made for the registration of any coupon bonds as to principal alone and also as to both principal and interest, for the reconversion into coupon bonds of any bonds registered as to both principal and interest, and for the interchange of registered and coupon bonds. The Authority may sell such bonds in such manner, either at public or negotiated sale, and for such price, as it may determine will best effect the purposes of this section.

The proceeds of the bonds shall be used solely for the payment of the cost of Authority Facilities, including im-

provements, and shall be disbursed in such manner and under such restrictions, if any, as the Authority may provide in the resolution authorizing the issuance of such bonds or in the trust agreement hereinafter mentioned securing the same. If the proceeds of the bonds of any issue, by error of estimates or otherwise, shall be less than such cost, additional bonds may in like manner be issued to provide the amount of such deficit, and, unless otherwise provided in the resolution authorizing the issuance of such bonds or in the trust agreement securing the same, shall be deemed to be of the same issue and shall be entitled to payment from the same fund without preference or priority of the bonds first issued. If the proceeds of the bonds of any issue shall exceed such cost, the surplus shall be deposited to the credit of the sinking fund for such bonds.

Prior to the preparation of definitive bonds, the Authority may, under like restrictions, issue interim receipts or temporary bonds, with or without coupons, exchangeable for definitive bonds when such bonds shall have been executed and are available for delivery. The Authority may also provide for the replacement of any bonds which shall become multilated or shall be destroyed or lost. Bonds may be issued under the provisions of this section without obtaining the consent of any agency of the Commonwealth of Virginia, and without any other proceedings, conditions or things not specifically required by this section.

§ 11. Refunding bonds.—The Authority is hereby authorized to provide by resolution for the issuance of its revenue refunding bonds for the purpose of refunding any bonds then outstanding which shall have been issued under the provisions of this act, including the payment of any redemption premium thereon and any interest accrued or to accrue to the date of redemption of such bonds, and if deemed advisable by the Authority, for either or both of the following additional purposes: con-

structing improvements, extensions or enlargement of the Authority Facilities in connection with which the bonds to be refunded shall have been issued, and paying all or any part of the cost of any additional Authority Facilities. The issuance of such bonds, the maturities and other details thereof, the rights of the holders thereof, and the rights, duties and obligations of the Authority in respect to the same, shall be governed by the provisions of this act insofar as the same may be applicable. Revenue refunding bonds issued under this section may be sold or exchanged for outstanding bonds issued under this act and, if sold, the proceeds thereof may be applied to the purchases, redemption or payment of such outstanding bonds.

§ 12. Pledge of funds.—All moneys received pursuant to the provisions of this act, whether as proceeds from the sale of bonds, as revenues, or as grants, appropriations or other funds provided by federal, state or local governments, may be pledged to the payment of bonds issued by the Authority, if so pledged, shall be deemed to be trust funds to be held and applied solely as provided in this act.

§ 13. Marketability of bonds.—The Authority is authorized and empowered to exercise all or any part or combination of the powers herein granted, to make covenants other than and in addition to the covenants herein expressly authorized, of like, or different character; to make such covenants and to do any and all such acts and things as may be necessary or convenient or desirable in order to secure its bonds or, in the absolute discretion of the Authority, as will tend to make the bonds more marketable, notwithstanding that such covenants, acts or things may not be enumerated herein.

§ 14. Bonds as legal investments and security for public deposits.—Bonds issued by the Authority under the provisions of this act are hereby made securities in which all public officers and public bodies of the Commonwealth

and its political subdivisions, all insurance companies, trust companies, banking associations, investment companies, executors, administrators, trustees and other fiduciaries may properly and legally invest funds, including capital in their control or belonging to them. Such bonds are hereby made securities which may properly and legally be deposited with and received by any state or municipal officer or any agency or political subdivision of the Commonwealth for any purpose for which the deposit of bonds or obligations is now or may hereafter be authorized by law.

§ 15. Credit of Commonwealth and political subdivisions not pledged.—Revenue bonds issued under the provisions of this act shall not constitute a debt of the Commonwealth of Virginia or of any other political subdivision thereof nor a pledge of the faith and credit of the Commonwealth or of any political subdivision thereof. Such bonds shall be payable solely from funds provided therefor from revenues. The issuance of revenue bonds under the provisions of this act shall not directly, indirectly, or contingently obligate the Commonwealth or any political subdivision thereof to the payment thereof or to the levy or pledge of any form of taxation whatever therefor. All such revenue bonds shall contain a statement on their face substantially to this effect.

§ 16. Trust agreement.—In the discretion of the Authority any bonds issued under the provisions of this act may be secured by a trust agreement by and between the Authority and a corporate trustee, which may be any trust company or bank having the power of a trust company within or without the Commonwealth of Virginia. Such trust agreement or the resolution providing for the issuance of such bonds may pledge or assign the fees and other revenues to be received, but shall not convey or mortgage the airports or any part thereof. Such trust agreement or resolution providing for the issuance of such bonds may contain such provisions for protecting and

enforcing the rights and remedies of the bondholders as may be reasonable and proper and not in violation of law, including covenants setting forth the duties of the Authority in relation to the acquisiton of property and the construction, improvement, maintenance, repair, operation and insurance of the airports, the rates or fees or other charges to be charged, and the custody, safeguarding and application of all moneys. It shall be lawful for any bank or trust company incorporated under the laws of the Commonwealth of Virginia which may act as depositary of the proceeds of bonds or of revenues to furnish such indemnifying bonds or to pledge such securities as may be required by the Authority. Any such trust agreement may set forth the rights and remedies of the bondholders. In addition to the foregoing, any such trust agreement or resolution may contain such other provisions as the Authority may deem reasonable and proper for the security of the bondholders. All expenses incurred in carrying out the provisions of such trust agreement or resolution may be treated as a part of the cost of the operation of the airports.

§ 17. Revenues.—The Authority is hereby authorized to fix, revise, charge and collect fees or other charges for the use of the airports and to contract with any person, partnership, association or corporation desiring the use of any part thereof, including the right-of-way adjoining the airports for placing thereon telephone, telegraph, electric light or power lines, and to fix the terms, conditions, rents and fees or other charges for such use. Such fees or other charges shall be so fixed and adjusted in respect of the aggregate of fees or other charges from the airports as to provide a fund sufficient with other revenues, if any, (i) to pay the cost of maintaining, repairing and operating the airports, (ii) to pay the principal of and interest on such bonds as the same shall become due and payable, and (iii) to create reserves for such purposes. The fees and other charges and all other revenues derived from the airports, except such part thereof as may be

necessary to pay such cost of maintenance, repair and operation and provide such reserves as may be provided for in the resolution authorizing the issuance of such bonds or in the trust agreement securing the same, shall be set aside at such regular intervals as may be provided in such resolution or such trust agreement in a sinking fund which is hereby pledged to, and charged with, the payment of the principal of and the interest on such bonds as the same shall become due, and the redemption price or the purchase price of bonds retired by call or purchase as therein provided. Such pledge shall be valid and binding from the time when the pledge is made. The fees and other charges and other revenues or other moneys so pledged and thereafter received by the Authority shall immediately be subject to the lien of such pledge without any physical delivery thereof or further act, and the lien of any such pledge shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the Authority, irrespective of whether such parties have notice thereof. Neither the resolution nor any trust agreement by which a pledge is created need be filed or recorded except in the records of the Authority. The use and disposition of moneys to the credit of such sinking fund shall be subject to the provisions of the resolution authorizing the issuance of such bonds or of such trust agreement. Except as may otherwise be provided in such resolution or such trust agreement, such sinking fund shall be a fund for all such bonds without distinction or priority of one over another.

§ 18. Trust funds.—All proceeds from the sale of bonds and revenues derived therefrom received pursuant to the provisions of this act shall be deemed to be trust funds to be held and applied solely as provided in this act. The Authority may, in the resolution authorizing the bonds or in the trust agreement securing such bonds, provide for the payment of the proceeds of the sale of the bonds and the revenues of the Authority to a trustee,

which may be any trust company or bank having the powers of a trust company within or without the Commonwealth of Virginia, which shall act as trustee of the funds and hold and apply the same to the purposes of this act, subject to such regulations as this act and such resolution or trust agreement may provide. The trustee may invest and reinvest such funds in such securities as may be provided in the resolution authorizing the bonds or in the trust agreement securing such bonds.

§ 19. Annual audit.—The Authority shall keep suitable records of all its financial transactions and shal have the same audited annually. Copies of such audit shall be furnished to the Governor of the Commonwealth of Virginia and to the Mayor of the District of Columbia and shall be open to public inspection.

§ 20. Remedies.—Any holder of bonds issued under the provisions of this act or of any of the coupons appertaining thereto, and the trustee under any trust agreement, except to the extent the rights herein given, may be restricted by such trust agreement, may either at law or in equity, by suit, action, injunction, mandamus or other proceedings, protect and enforce any and all rights under the laws of the Commonwealth of Virginia, or granted by this act or under such trust agreement or the resolution authorizing the issuance of such bonds and may enforce and compel the performance of all duties required by this act or by such agreement or resolution to be performed by the Authority or by any officer or agent thereof including the fixing, charging and collection of fees or other charges.

§ 21. Exemption from taxation.—The exercise of the powers granted by this act shall be in all respects for the benefit of the inhabitants of the Commonwealth of Virginia, for the increase of their commerce, and for the promotion of their safety, health, welfare, convenience and prosperity, and as the operation and maintenance of the airports by the Authority will constitute the perform-

ance of essential governmental functions, the Authority shall not be required to pay any taxes or assessments upon the airports or any property acquired or used by the Authority under the provisions of this act or upon the income therefrom; and the bonds issued under the provisions of this act, their transfer and the income therefrom, including any profit made on the sale thereof, shall at all times be free and exempt from taxation by the Commonwealth of Virginia and by any municipality, county or other political subdivision thereof.

§ 22. Jurisdiction of courts; liability for contracts and torts.—A. The courts of the Commonwealth of Virginia shall have original jurisdiction of all actions brought by or against the Authority, which courts shall in all cases apply the law of the Commonwealth of Virginia.

B. The Authority shall be liable for its contracts and for its torts and those of its members, officers, employees, and agents committed in the conduct of any proprietary function, in accordance with the law of the Commonwealth of Virginia but shall not be liable for any torts occurring in the performance of a governmental function. The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be by suit against the Authority. Nothing in this act shall be construed as a waiver by the Commonwealth of Virginia or the District of Columbia or of their political subdivisions of any immunity from suit.

C. The Authority shall be responsible for all executory contracts entered into by the United States with respect to the former Metropolitan Washington Airports before the date of acquisition of those airports, except that the procedure for disputes resolution contained in any such contract shall continue to govern the performance of the contract unless otherwise agreed to by the parties to the contract.

D. The Authority shall not be responsible for any tort claims arising before the date of transfer.

§ 23. Procurement Act exemption.—In light of the multi-jurisdictional nature of the Authority, an exemption is hereby provided to the Authority from the provisions of the Virginia Public Procurement Act.

§ 24. Act liberally construed.—This act, being necessary for the welfare of the Commonwealth of Virginia and its inhabitants, shall be liberally construed to effect the purposes thereof.

§ 25. Constitutional construction.—The provisions of this act are severable and if any of its provisions shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions of this act. It is hereby declared to be the legislative intent that this act would have been adopted had such unconstitutional provisions not been included therein.

§ 26. Inconsistent laws applicable.—All other general or special laws inconsistent with any provision of this act are hereby declared to be inapplicable to the provisions of this act.

§ 27. Effective date.—This act shall only become effective upon the enactment into law by the Congress of the United States of legislation that authorizes and directs the sale, lease, or other disposition of the Metropolitan Washington Airports to an Airport Authority created by the legislatures of the Commonwealth of Virginia and the District of Columbia pursuant to an agreement or compact that is consistent with the provisions of this act: provided, however, the Governor may make appointments for initial Authority membership at such time or times following the passage of this act as he may deem appropriate.

1987 SESSION

VIRGINIA ACTS OF ASSEMBLY—CHAPTER 665

An Act to amend and reenact §§ 1, 4, 5, 6, 7 and 27 of Chapter 598 of the 1958 Acts of Assembly which created a regional airport authority to acquire Washington National Airport and Washington Dulles International Airport from the federal government, relating to definitions; powers, duties, rules, regulations and police powers of the authority; and the effective date of the chapter; penalty.

[S 672]

Approved Apr. 8, 1987

Be it enacted by the General Assembly of Virginia:

1. That §§ 1, 4, 5, 6, 7 and 27 of Chapter 598 of the 1985 Acts of Assembly are amended and reenacted as follows:

§ 1. Definitions.—For the purposes of this act the following terms and phrases shall have the following meanings:

"Authority Facilities" shall mean any or all airport facilities now existing or hereafter acquired or constructed or caused to be constructed by the Authority under this act, and together with any or all buildings, improvements, additions, extensions, replacements, appurtenances, lands, rights in land, water rights, air rights, franchises, machinery, equipment, furnishings, landscaping, easements, utilities, approaches, roadways and other facilities necessary or desirable in connection therewith or incidental thereto, including the existing Dulles Airport Access Road and its right-of-way, acquired or constructed by the Authority;

"Authority" shall mean the Metropolitan Washington Airports Authority [hereinafter][*] created *by this act*

[*] Bracketed material struck through on original.

and by similar enactment by the District of Columbia or, if the Authority shall be abolished, the board, body, or commission or agency succeeding to the principal functions thereof or upon whom the powers given by this act to the Authority shall be conferred by law;

"Cost" shall mean, as applied to Authority Facilities, the cost of acquisition of all lands, structures, rights-of-way, franchises, easements and other property rights and interests, the cost of lease payments, the cost of construction, the cost of demolishing, removing or relocating any buildings or structures on lands acquired, including the cost of acquiring any lands to which such buildings or structures may be moved or relocated, the cost of any extensions, enlargements, additions and improvements, the cost of all labor, materials, machinery and equipment, financing charges, interest on all bonds prior to and during construction and, if deemed advisable by the Authority, for a period not exceeding one year after completion of such construction, the cost of engineering, financial and legal services, plans, specifications, studies, surveys, estimates of cost and of revenues, other expenses necessary or incident to determining the feasibility or practicability of constructing the Authority Facilities, administrative expenses, provisions for working capital, reserves for interest and for extensions, enlargements, additions and improvements, the cost of bond insurance and other devices designed to enhance the creditworthiness of the bonds, and such other expenses as may be necessary or incidental to the construction of the Authority Facilities, the financing of such construction and the placing of the Authority Facilities in operation. Any obligation or expenses incurred by the Commonwealth or any agency thereof, with the approval of the Authority, for studies, surveys, borings, preparation of plans and specifications or other work or materials in connection with the construction of the Authority Facilities may be regarded as part of the cost of the Authority Facilities

and may be reimbursed to the Commonwealth or such agency out of any funds available therefor or the proceeds of the revenue bonds issued for such Authority Facilities as hereinafter authorized.

"Bonds" or "revenue bonds" shall mean bonds and notes or refunding bonds and notes or bond anticipation notes or other obligations of the Authority issued under the provisions of this act.

§ 4. Membership; terms; officers.—A. The Authority shall consist of eleven members: five appointed by the Governor of the Commonwealth of Virginia, three appointed by the Mayor of the District of Columbia, two appointed by the Governor of the State of Maryland, and one appointed by the President of the United States. Members representing the Commonwealth of Virginia shall be subject to confirmation by the Virginia General Assembly. For the purposes of doing business, six members shall constitute a quorum. The failure of a single appointing official to appoint one or more members, as herein provided, shall not impair the Authority's creation when the other conditions thereof have been met.

B. Members shall (i) not hold elective or appointive public office, (ii) serve without compensation, and (iii) reside within the Washington Standard Metropolitan Statistical Area, except that the member appointed by the President of the United States shall not be required to reside in that area. The members of the Authority shall be entitled to reimbursement for their expenses incurred in attendance upon the meetings of the Authority or while otherwise engaged in the discharge of their duties.

C. Appointments to the Authority shall be for a period of six years. However, initial appointments shall be made as follows: each jurisdiction shall appoint one member for a full six-year term, a second member for a four-year term and in the case of the Commonwealth and the District of Columbia, a third member for a two-year

term. The Governor of Virginia shall make the final two Virginia initial appointments for one two-year and one four-year term. The President shall make initial and subsequent appointments for six-year terms.

D. Seven affirmative votes shall be required to approve bond issues and the annual budget of the Authority.

E. Each member may be removed or suspended from office only for cause, and in accordance with the laws of the jurisdiction from which he is appointed.

F. The Authority shall annually elect one of its members as chairman and another as vice-chairman and shall also elect annually a secretary and a treasurer, or a secretary-treasurer, who may or may not be member of the Authority, and prescribe their powers and duties. The Authority may also appoint from its staff an assistant secretary and an assistant treasurer, or an assistant secretary-treasurer, who shall, in addition to their duties, discharge such functions of the secretary and the treasurer.

G. The members of the Authority shall continue to serve until their successors shall be duly appointed. Any person appointed to fill a vacancy shall serve for the unexpired term. Any member of the Authority shall be eligible for reappointment for one term.

H. The members of the Authority, *including any nonvoting members,* shall not be personally liable for any act done or action taken in their capacities as members of the Authority, *or its board of review,* nor shall they be personally liable for any bond, note or other evidence of indebtedness issued by the Authority.

§ 5. Powers and duties of the Authority.—*A*. For the purpose of acquiring, operating, maintaining, developing, promoting and protecting Washington National Airport and Washington Dulles International Airport together as primary airports for public purposes serving the metro-

politan Washington area, the Authority shall have all necessary or convenient powers including, but not limited to, the power:

1. To adopt and amend bylaws for the regulation of its affairs and the conduct of its business;

2. To plan, establish, operate, develop, construct, enlarge, maintain, equip, [operate] and protect the airports;

3. To adopt and amend regulations to carry out the power granted by this section;

4. To adopt an official seal and alter the same at its pleasure;

5. To appoint one or more advisory committees *and to establish a board of review*;

6. To issue revenue bonds of the Authority for any of its purposes, payable solely from the fees and revenues pledged for their payment, and to refund its bonds, all as provided in this act;

7. To borrow money on a short-term basis and issue from time to time its notes therefor payable on such terms, conditions or provisions as it may deem advisable;

8. To fix, revise, charge, and collect rates, fees, rentals and other charges for the use of the airports;

9. To acquire, hold and dispose of real and personal property in the exercise of its powers and the performance of its duties under this act;

10. To employ, in its discretion, consulting engineers, attorneys, accountants, construction and financial experts, superintendents, managers, and such other employees and agents as may be necessary, and to fix their compensation and benefits. [However, the] *Employees of the Authority shall not participate in any strike or assert any right to strike against the Authority, and any employment agreement entered into by the Authority shall contain an ex-*

plicit prohibition against strikes by the employee or employees covered by such agreement. The Authority shall comply with any Act of Congress concerning former employees of the Federal Aviation Administration and Metropolitan Washington Airports;

11. To sue and be sued in its own name, plead and be impleaded;

12. To construct or permit the construction of commercial and other facilities *consistent with the purposes of this act* upon the airport property on terms established by the authority [and consistent with the purposes of this act];

13. To make and enter into all contracts and agreements necessary to desirable to the performance of its duties, the proper operation of the airports and the furnishing of services to the travelling public and airport users, *including contracts for normal governmental services on a reimbursable basis with local political subdivisions where the Authority Facilities are situated and with the District of Columbia government;* and *any* such contracts shall be exclusive or limited when it is necessary to further the public safety, improve the quality of service, avoid duplication of services, or conserve airport property and the airport environment;

14. To apply for, receive and accept such payments, appropriations, grants, gifts, loans, advances, and other funds, properties, and services as may be transferred or made available to it by the United States government or any other public or private entity or individual; [and]

15. To make payments to reimburse the local political subdivisions where the Authority Facilities are situated for extraordinary law enforcement costs incurred by such localities; and

[15.] *16.* To do all acts and things necessary or convenient to carry out the powers expressly granted in this act.

B. Pursuant to Section 6007 (b) of the Metropolitan Washington Airports Act of 1986, the Authority is established solely to operate and improve both metropolitan Washington airports as primary airports serving the metropolitan Washington area and shall be independent of the Commonwealth and its local political subdivisions, the District of Columbia and the federal government in the performance and exercise of the airport-related duties and powers enumerated in subdivisions 1 through 16 of subsection A of this section. Any conflict between the exercise of these enumerated powers by the Authority and the powers of any local political subdivision within which Authority Facilities are situated shall be resolved in favor of the Authority.

§ 6. Authority rules and regulations.—*A.* The Authority shall have the power to adopt, amend, and repeal rules and regulations pertaining to the use, maintenance and operation of its facilities and governing the conduct of persons and organizations using its facilities.

B. Unless the Authority shall be unanimous vote of all members present determine that an emergency exists, the Authority shall, prior to the adoption of any rule or regulation or alteration, amendment or modification thereof:

[a.] *1.* Make such rule, regulation, alteration, amendment, or modification in convenient form available for public inspection in the office of the Authority for at least ten days;

[b.] *2.* Publish a notice in a newspaper or newspapers of general circulation *in the District of Columbia and* in the *local* political [subdivision] *subdivisions of the Commonwealth* where the [Authority's] *Authority* Facilities are located declaring the Authority's intention to consider adopting such rule, regulation, alteration, amendment, or modification and informing the public that the Authority will hold a public hearing at which any person

may appear and be heard for or against the adoption of such rule or regulation or such alteration, amendment, or modification, on a day and at a time to be specified in the notice, after the expiration of at least ten days from the day of the publication thereof; and

[c.] *3.* Hold the public hearing on the day and at the time specified in such notice or any adjournment thereof, and hear persons appearing for or against such rule, regulation, alteration, amendment or modification.

C. The Authority's rules and regulations shall be available for public inspection in the Authority's principal office.

D. The Authority's rules and regulations relating to:

[a.] *(i)* Air operations and motor vehicle traffic, including but not limited to, motor vehicle speed limits and the location of and payment for public parking;

[b.] *(ii)* Access to and use of Authority Facilities, including but not limited to solicitation, handbilling, picketing and the conduct of commercial activities; and

[c.] *(iii)* Aircraft operation and maintenance;

shall have the force and effect of law, as shall any other rule or regulation of the Authority which shall contain a determination by the Authority that it is necessary to accord the same force and effect of law in the public interest; provided, however, that with respect to motor vehicle traffic rules and regulations, the Authority shall obtain the approval of the traffic engineer or comparable official of the *local* political subdivision in which such rules or regulations are to be enforced. [The violation of any rule or regulation of the Authority relating to motor vehicle traffic shall be tried and punished in the same manner as if it had been committed on the public roads of the political subdivision in which such violation occurred; all other violations of the Authority's rules and regulations having the force and effect of law shall be punishable as misdemeanors.]

E. The violation of any rule or regulation of the Authority establishing a noise limitation on aircraft that operate at the Authority Facility shall subject the violator, in the discretion of the circuit court of any political subdvision where the facility is located to a civil penalty not to exceed $2,500 for each violation. Such penalty shall be paid to the Authority. With the consent of the violator or the accused violator of a rule establishing aircraft noise limits, the Authority may provide, in an order issued against the violator or accused violator, for the payment of civil charges in specific sums not to exceed the limit that could be imposed by the court. Such civil charge when paid shall be in lieu of any civil penalty which could be imposed by the court. Any court proceeding shall be within the exclusive jurisdiction of the circuit court and shall be a civil proceeding at law brought by the Authority.

F. The violation of any Authority rule or regulation, having the force and effect of law, shall be a Class 1 misdemeanor unless otherwise specified by this chapter or unless a lesser penalty is set by the Authority in the rule or regulation. The rules of criminal procedure and evidence that apply throughout the Commonwealth shall apply to the adjudication of any case involving the violation of any Authority rule or regulation having the force and effect of law.

G. The courts of this Commonwealth shall take judicial notice of the Authority's regularly adopted rules and regulations. For the convenience of the courts which may regularly hear cases arising under the Authority's rules and regulations, the Authority may certify to the clerk of such court a copy of its rules and regulations. Any such certification, when signed by the chairman of the Metropolitan Washington Airports Authority, shall be accepted as evidence of the facts therein stated.

H. With respect to the violation of any statute of the Commonwealth, local ordinance or Authority rules or reg-

ulation having the force and effect of law occurring at the Authority Facilities:

1. The matter shall be within the jurisdiction of the state courts of the political subdivision where the violation occurred; violations occurring at Washington National Airport shall be within the jurisdiction of the courts for Arlington County;

2. The attorney for the Commonwealth shall have authority to prosecute those offenses in the name of the Commonwealth or local government as appropriate; and the county or city attorney, if otherwise authorized to prosecute offenses in the name of the county or city, shall have authority to prosecute those offenses in the name of the county or city; and

3. Sheriffs and clerks of the court shall provide those same services and exercise those same powers with respect to Authority Facilities within their jurisdiction as for their political subdvisions.

§ 7. Police.—[The Authority's employees meeting the minimum requirements of the Criminal Justice Officers Training Standards Commission may be given special police power by any of the circuit courts of the political subdivisions in which the Authority's Facilities are located. The authority conferred upon such special policemen shall be exercised only upon the Authority's Facilities and shall be in all terms consistent with the requirements of Chapter 3 of Title 15.1 of the Code of Virginia.]. *A. The Commonwealth hereby grants, accepts and agrees to concurrent police power authority over the Metropolitan Washington Airports as provided in Section 6009 (c) of the Metropolitan Washington Airports Act of 1986.*

B. The Authority is authorized to establish and maintain a regular police force and to confer police powers to be exercised with respect to offenses occurring on the Authority Facilities upon its employees meeting the min-

imum requirements of the Department of Criminal Justice Services.

Such [special policemen] *police offictrs* shall have all powers vested in police officers under Chapter 3 of Title 15.1, *Chapter 11 of Title 16.1, Title 18.2 and Title 46.1* of the Code of Virginia and shall be responsible upon the [Authority's] *Authority* Facilities *and within 300 yards of the Facilities* for enforcing *the laws of the Commonwealth,* the Authority's rules and regulations and all other applicable [statutes,] ordinances, rules, and regulations [of this Commonwealth and political subdivisions, agencies, and instrumentalities thereof].

Such [special policemen] *police officers* may issue summons to appear, or arrest on view or on information without warrant as permitted by law, and conduct before any [court] *judicial officer* of competent jurisdiction any person violating, *upon Authority Facilities,* any rule or regulation *of the Authority, any ordinance or regulation of any local political subdivision, or any other law of the Commonwealth.*

[For the purpose of enforcing such statutes, ordinances, rules and regulations, the court or courts having jurisdiction for the trial of criminal offenses of the political subdivision wherein the offense was committed shall have jurisdiction to try a person charged with the violation of any such statutes, ordinances, rules and regulations.]

C. The Department of State Police shall exercise the same powers upon Authority Facilities as elsewhere in the Commonwealth.

D. The Authority may enter into reciprocal or mutual aid agreements with the local political subdivisions in which the Authority Facilities are situated, any agency of the Commonwealth or of the federal government, or any combination of the foregoing, for cooperation in the furnishing of police services.

E. The police force of Arlington County shall have concurrent jurisdiction with the police force established herein at Washington National Airport. The Authority shall enter into an agreement with Arlington County regarding the exercise of police authority.

F. The sheriffs and police forces of Loudoun and Fairfax Counties shall continue to exercise concurrent jurisdiction with the police force established herein over the Authority Facilities situated within their respective counties.

§ 27. Effective date.—This act shall only become effective upon the enactment into law by the Congress of the United States of legislation that authorizes and directs the sale, lease, or other disposition of the Metropolitan Washington Airports to [an Airport] *the* Authority [created by the legislatures of the Commonwealth of Virginia and the District of Columbia pursuant to an agreement or compact that is consistent with the provisions of this act]; provided, however, the Governor may make appointments for initial Authority membership at such time or times following the passage of this act as he may deem appropriate.

2. That an emergency exists and this act is in force from its passage.

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 6-67

"District of Columbia Regional Airports Authority Act of 1985".

Pursuant to Section 412 of the District of Columbia Self-Government and Governmental Reorganization Act, P. L. 93-198, "the Act", the Council of the District of Columbia adopted Bill No. 6-200 on first and second readings, September 10, 1985, and September 24, 1985, respectively. Following the signature of the Mayor on October 9, 1985, this legislation was assigned Act No. 6-90, published in the November 1, 1985, edition of the *D.C. Register*, (Vol. 32 page 6093) and transmitted to Congress on October 10, 1985 for a 30-day review, in accordance with Section 602 (c)(1) of the Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional Review Period has expired, and therefore, cites this enactment as D.C. Law 6-67, effective December 3, 1985.

/s/ David A. Clarke
DAVID A. CLARKE
Chairman of the Council

Dates Counted During the 30-day Congressional Review Period:

October 10,11,16,17,18,21,22,23,24,25,28,29,30,31

November 1,4,5,6,7,8,12,13,14,15,18,19,20,21,22

December 2

AN ACT
D.C. ACT 6-90

IN THE COUNCIL OF
THE DISTRICT OF COLUMBIA

Oct. 09, 1985

To endorse on behalf of the District government the creation of a regional airport authority to acquire Washington National Airport and Washington Dulles International Airport from the federal government.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "District of Columbia Regional Airports Authority Act of 1985".

Sec. 2. Definitions. For the purposes of this act, the term:

(1) "Authority facilities" means any or all airport facilities now existing or subsequently acquired or constructed or caused to be constructed by the Authority under this act, together with any or all buildings, improvements, additions, extensions, replacements, appurtenances, lands, rights in land, water rights, air rights, franchises, machinery, equipment, furnishings, landscaping, easements, utilities, approaches, roadways and other facilities necessary or desirable in connection with or incidental to the facilities, including the existing Dulles Airport access road and its right-of-way, acquired or constructed by the Authority.

(2) "Authority" means the Metropolitan Washington Airports Authority to be created by the legislatures of

the Commonwealth of Virginia and the District of Columbia with an agreement or compact that is consistent with the provisions of this act, or, if the Authority to be created is later abolished, the board, body, or commission or agency succeeding to the principal functions of the Authority or upon whom the powers given by this act to the Authority shall be conferred by law.

(3) "Cost" means, as applied to Authority facilities, the cost of acquisition of all lands, structures, rights of way, franchises, easements, and other property rights and interests, the cost of lease payments, the cost of construction, the cost of demolishing, removing, or relocating any buildings or structures on lands acquired, including the cost of acquiring any lands to which the buildings or structures may be moved or relocated, the cost of any extensions, enlargements, additions and improvements, the cost of all labor, materials, machinery and equipment, financing charges, interest on all bonds prior to and during construction and, if considered advisable by the Authority, for a period not exceeding 1 year after completion of construction, the cost of engineering, financial and legal services, plans, specifications, studies, surveys, estimates of cost and of revenues, other expenses necessary or incident to determining the feasibility or practicability of constructing the Authority facilities, administrative expenses, provisions for working capital, reserves for interest and for extensions, enlargements, additions and improvements, the cost of bond insurance and other devices designed to enhance the creditworthiness of the bonds, and other expenses necessary or incidental to the construction of the Authority facilities, the financing of this construction, and the placing of the Authority facilities in operation. Any obligation or expenses incurred by the District of Columbia ("District") or any agency of the District, with the approval of the Authority, for studies, surveys, borings, preparation of plans and specifications or other work or materials in connection with the construction of the Authority facilities may be

regarded as part of the cost of the Authority facilities and may be reimbursed to the District or the agency out of any funds available for these purposes or the proceeds of the revenue bonds issued for Authority facilities as authorized by this act.

(4) "Bonds" or "revenue bonds" means bonds and notes or refunding bonds and notes or bond anticipation notes or other obligations of the Authority issued under the provisions of this act.

Sec. 3. Metropolitan Washington Airports Authority created.

There is created the Metropolitan Washington Airports Authority, ("Authority"), a public body corporate and politic and independent of all other bodies, having the powers and jurisdiction enumerated by this act, and other and additional powers as shall be conferred upon it jointly by the legislative authorities of the Commonwealth of Virginia and the District or by either of the jurisdictions and concurred in by the legislative authority of the other jurisdiction.

Sec. 4. Authorization of the Authority.

The Authority created by this act is authorized, when similarly authorized by the Commonwealth of Virginia, to acquire from the United States of America, by lease or otherwise, the 2 airports known as Washington National Airport and Washington Dulles International Airport and all related properties now administered by Metropolitan Washington Airports, an agency of the Federal Aviation Administration of the United States Department of Transportation, but only with the approval of the Mayor of the District of Columbia. Subject to this mayoral approval, general consent is given to conditions imposed by the Congress of the United States on acquisitions that are not inconsistent with this act. The Mayor shall procure the concurrence of the Council of the District of Columbia, by resolution, prior to Mayoral ap-

proval of the terms of the compact, lease or other agreements which effectuate the acquisition.

Sec. 5. Membership; terms; officers.

The Authority shall consist of 11 members: Five appointed by the Governor of the Commonwealth of Virginia, 3 appointed by the Mayor of the District, 2 appointed by the Governor of the State of Maryland, and 1 appointed by the President of the United States. Members representing the District shall be subject to confirmation by the Council of the District of Columbia. For the purposes of doing business, 6 members shall constitute a quorum. The failure of a single appointing official to appoint 1 or more members, as provided in this act, shall not impair the Authority's creation when the other conditions of this creation have been met.

(b) Members shall: (1) Not hold elective or appointive public office; (2) serve without compensation; and (3) reside within the Washington Standard Metropolitan Statistical Area, except that the member appointed by the President of the United States shall not be required to reside in that area. The members of the Authority shall be entitled to reimbursement for their expenses incurred in attending the meetings of the Authority or while otherwise engaged in the discharge of their duties.

(c) Appointments to the Authority shall be for a period of 6 years. However, initial appointment shall be made as follows: Each jurisdiction shall appoint 1 member for a full 6-year term, a second member for a 4-year term and in the case of the Commonwealth of Virginia and the District, a third member for a 2-year term. The Governor of Virginia shall make the final 2 Virginia initial appointments for one 2-year and one 4-year term. The President shall make initial and subsequent appointments for 6-year terms.

(d) Seven affirmative votes shall be required to approve bond issues and the annual budget of the Authority.

(e) Each member may be removed or suspended from office only for cause, and in accordance with the laws of the jurisdiction from which the member is appointed.

(f) The Authority shall elect annually 1 of its members as chairman and another as vice-chairman and shall also elect annually a secretary and a treasurer, or a secretary-treasurer, who may or may not be members of the Authority, and prescribe their powers and duties. The Authority may also appoint from its staff an assistant secretary and an assistant treasurer, or an assistant secretary-treasurer, who shall, in addition to other duties, discharge the functions of the secretary and the treasurer.

(g) The members of the Authority shall continue to serve until their successors are duly appointed. Any person appointed to fill a vacancy shall serve for the unexpired term. Any member of the Authority shall be eligible for reappointment for 1 term.

(h) The members of the Authority shall not be personally liable for any act done or action taken in their capacities as members of the Authority, nor shall they be personally liable for any bond, note, or other evidence of indebtedness issued by the Authority.

Sec. 6. Powers and duties of the Authority.

For the purpose of acquiring, operating, maintaining improving, promoting and protecting Washington National Airport and Washington Dulles International Airport together as primary airports for public purposes serving the metropolitan Washington area, the Authority shall have all necessary or convenient powers including, but not limited to, the power:

(1) To adopt and amend by-laws for the regulation of its affairs and the conduct of its business;

(2) To plan establish, operate, develop, construct, enlarge, maintain, equip, operate and protect the airports;

(3) To adopt and amend regulations to carry out the powers granted by this section;

(4) To adopt an official seal and alter this seal at its pleasure;

(5) To appoint one or more advisory committees;

(6) To issue revenue bonds of the Authority for any of its purposes, payable solely from the fees and revenues pledged for their payment, and to refund its bonds, all as provided in this act;

(7) To borrow money on a short-term basis and issue from time to time its notes therefor payable on terms, conditions, or provisions as it may deem advisable;

(8) To fix, revise, charge, and collect rates, fees, rentals and other charges for the use of the airports;

(9) To acquire, hold and dispose of real and personal property in the exercise of its powers and the performance of its duties under this act;

(10) To employ, in its discretion, consulting engineers, attorneys, accountants, construction and financial experts, superintendents, managers, and other employees and agents as may be necessary, and to fix their compensation and benefits. However, the Authority shall comply with any act of Congress concerning former employees of the Federal Aviation Administration and Metropolitan Washington Airports;

(11) To sue and be sued in its own name, plead and be impleaded;

(12) To construct or permit the construction of commercial and other facilities upon the airport property on terms established by the Authority and consistent with the purposes of this act;

(13) To make and enter into all contracts and agreements necessary or desirable to the performance of its duties, the proper operation of the airports and the fur-

nishing of services to the traveling public and airport users, and these contracts shall be exclusive or limited when it is necessary to further the public safety, improve the quality of service, avoid duplication of services; or conserve airport property and the airport environment;

(14) To apply for, receive, and accept payments, appropriations, grants, gifts, loans, advances, and other funds, properties, and services as may be transferred or made available to it by the United States government or any other public or private entity or individual; and

(15) To do all acts necessary or convenient to carry out the powers expressly granted in this act.

Sec. 7. Authority rules and regulations.

(a) The Authority shall have the power to adopt, amend, and repeal rules and regulations pertaining to the use, maintenance and operation of its facilities and governing the conduct of persons and organizations using its facilities.

(b) Unless the Authority shall by unanimous vote of all members present determine that an emergency exists, the Authority shall, before the adoption of any rule or regulation or alteration, amendment or modification;

(1) Make the rule, regulation, alteration, amendment, or modification in convenient form available for public inspection in the office of the Authority for at least 10 days;

(2) Publish a notice in a newspaper or newspapers of general circulation in the political subdivision where the Authority's facilities are located and the District declaring the Authority's intention to consider adopting the rule, regulation, alteration, amendment, or modification and informing the public that the Authority will hold a public hearing at which any person may appear and be heard for or against the adoption of the rule or regulation or the alteration, amendment, or modification, on a

day and at a time to be specified in the notice, after the expiration of at least 10 days from the day of the publication; and

(3) Hold the public hearing on the day and at the time specified in the notice of any adjournment of the hearing, and hear persons appearing for or against the rule, regulation, alteration, amendment, or modification.

(c) The Authority's rules and regulations shall be available for public inspection in the Authority's principal office.

(d) The Authority's rules and regulations relating to:

(1) Air operations and motor vehicle traffic, including but not limited to, motor vehicle speed limits and the location of and payment for public parking;

(2) Access to and use of Authority facilities, including but not limited to solicitation, handbilling, picketing and the conduct of commercial activities; and

(3) Aircraft operation and maintenance, shall have the force and effect of law, as shall any other rule or regulation of the Authority that shall contain a determination by the Authority that it is necessary to accord the same effect of law in the public interest; except, that, with respect to motor vehicle traffic rules and regulations, the Authority shall obtain the approval of the traffic engineer or comparable official of the political subdivision in which the rules or regulations are to be enforced. The violation of any rule or regulation of the Authority relating to motor vehicle traffic shall be tried and punished in the same manner as if it had been committed on the public roads of the political subdvisions in which the violation occurred. All other violations of the Authority's rules and regulations having the effect of law shall be punishable as misdemeanors.

Sec. 8. Police powers.

(a) The Authority's employees meeting the minimum requirements of the Commonwealth of Virginia's Criminal Justice Officer's Training Standards Commission may be given special police power by any of the circuit courts of the political subdivisions in which the Authority's facilities are located. The authority conferred upon these special police officers shall be exercised only upon the Authority's facilities and shall be in all terms consistent with the requirements of chapter 3 of title 15.1 of the Code of Virginia.

(b) These special police officers shall have all powers vested in police officers under chapter 3 of title 15.1 of the Code of Virginia and shall be responsible upon the Authority's facilities for enforcing the Authority's rules and regulations and all other applicable statutes, ordinances, rules, and regulations of the Commonwealth of Virginia and political subdivision, agencies, and instrumentalities of the Commonwealth of Virginia.

(c) These special police officers shall issue summonses to appear, or arrest on view or on information without warrant as permitted by law, and conduct before any court of competent jurisdiction any person violating any rule or regulation.

(d) For the purpose of enforcing these statutes, ordinances, rules, and regulations, the court or courts having jurisdiction for the trial of criminal offenses of the political subdivisions where the offense was committed shall have jurisdiction to try a person charged with the violation of the statutes, ordinances, rules, and regulations.

Sec. 9. Operation of foreign trade zone.

The Authority may establish, operate, and maintain a foreign trade zone and otherwise expedite and encourage foreign commerce.

Sec. 10. Acquisition of property; eminent domain.

(a) The Authority may acquire by purchase, lease, or grant additional lands, structures, property, rights, rights-of-way, franchises, easements and other interests in lands as it may consider necessary or convenient for construction and operation of the airports, upon terms and at prices as may be considered by it to be reasonable and can be agreed upon between it and the owner.

(b) The District may provide services, donate real or personal property, and make appropriations to the Authority for the acquisition, construction, maintenance, and operation of the Authority facilities. The Authority may agree to assume or reimburse the District for any indebtedness incurred by the District with respect to facilities conveyed by the District to the Authority. With the consent of the Council of the District of Columbia, the agreement may be made subordinate to the Authority's indebtedness to others.

(c) The Authority is granted full power to exercise the right of eminent domain within the Commonwealth of Virginia in the acquisition of any lands, easements, privileges or other property interests that are necessary for airport and landing field purposes, including the right to acquire, by eminent domain, aviation easements over lands or water outside the boundaries of its airports or landing fields where necessary in the interests of safety for aircrafts to provide unobstructed air space for the landing and taking off of aircraft utilizing its airports and landing fields even though the aviation easement may be inconsistent with the continued use of the land, or inconsistent with the maintenance, preservation and renewal of any structure or any tree or other vegetation standing or growing on the land at the time of the acquisition. Proceedings for the acquisition of lands, easements and privileges by condemnation may be instituted and conducted in the name of the Authority in accordance with title 25 of the Code of Virginia.

Sec. 11. Revenue bonds.

(a) The Authority may provide by resolution for the issuance, at 1 time or from time to time, of revenue bonds of the Authority for the purpose of paying all or any part of the cost of Authority facilities, including the refunding of federal appropriations not reimbursed to the United States Treasury by the Metropolitan Washington Airports. The principal of and the interest on these bonds shall be payable solely from the funds provided for this payment. The bonds of each issue shall be dated, shall mature at times not exceeding 40 years from their dates, as may be determined by the Authority, and may be subject to redemption or repurchase before maturity, at the option of the Authority, at prices and under these terms and conditions as may be fixed by the Authority before the issuance of the bonds. The bonds may bear interest payable at times and at rates as determined by the Authority or as determined in the manner as the Authority may provide, including the determination by agents designated by the Authority under guidelines established by it. The Authority shall determine the form and the manner of execution of the bonds, including any interest coupons to be attached to the bonds, and shall fix the denominations of the bonds and the places of payment of principal and interest, which may be at any bank or trust company within or without the District of Columbia. In case any officer whose signature or a fascimile of whose signature appears on any bonds or coupons shall cease to be that officer before the delivery of the bonds, the signature or fascimile shall be valid and sufficient for all purposes the same as if the officer had remained in office until delivery. Notwithstanding any other provision of this act or any recitals in any bonds issued under the provisions of this section, all bonds shall be considered to be negotiable instruments under the laws of the District. The bonds may be issued in coupon or in registered form, or both, as the Authority may determine, and provision may be made for the registration of any coupon bonds as

to principal alone and also as to both principal and interest, for the reconversion into coupon bonds of any bonds registered as to both principal and interest, and for the interchange of registered and coupon bonds. The Authority may sell bonds in the manner, either at public or negotiated sale, and for the price, as it may determine will best effect the purposes of this section.

(b) The proceeds of the bonds shall be used solely for the payment of the cost of Authority facilities, including improvements, and shall be disbursed in the manner and under the restrictions, if any, as the Authority may provide in the resolution authorizing the issuance of the bonds or in the trust agreement securing the bonds. If the proceeds of the bonds of any issue, by error of estimates or otherwise, shall be less than the cost, additional bonds may in like manner be issued to provide the amount of the deficit, and, unless otherwise provided in the resolution authorizing the issuance of the bonds or in the trust agreement securing the bonds, shall be considered to be of the same issue and shall be entitled to payment from the same fund without preference or priority of the bonds first issued. If the proceeds of the bonds of any issue shall exceed the cost, the surplus shall be deposited to the credit of the sinking fund for the bonds.

(c) Before the preparation of definitive bonds, the Authority may, under the same restrictions, issue interim receipts or temporary bonds, with or without coupons, exchangeable for definitive bonds when the bonds have been executed and are available for delivery. The Authority may also provide for the replacement of any bonds that become mutilated or have been destroyed or lost. Bonds may be issued under the provisions of this section without obtaining the consent of any agency of the District and without any other proceedings, conditions or things not specifically required by this section.

Sec. 12. Refunding bonds.

The Authority may provide by resolution for the issuance of its revenue refunding bonds for the purpose of refunding any bonds then outstanding which shall have been issued under the provisions of this act, including the payment of any redemption premium on the bonds and any interest accrued or to accrue to the date of redemption of the bonds, and if considered advisable by the Authority, for either or both of the following additional purposes: constructing improvements, extensions or enlargement of the Authority facilities in connection with which the bonds to be refunded shall have been issued; and, paying all or any part of the cost of any additional Authority facilities. The issuance of bonds, the maturities, and other details of the issuance, the rights of the holders of the bonds, and the rights, duties and obligations of the Authority in respect to the bonds, shall be governed by the provisions of this act insofar as this act may be applicable. Revenue refunding bonds issued under this section may be sold or exchanged for outstanding bonds issued under this act and, if sold, the proceeds of the bonds may be applied to the purchase, redemption, or payment of outstanding bonds.

Sec. 13. Pledge of funds.

All monies received pursuant to the provisions of this act, whether as proceeds from the sale of bonds, as revenues, or as grants, appropriations, or other funds provided by federal, state, or local governments, may be pledged to the payment of bonds issued by the Authority and, if so pledged, shall be considered to be trust funds to be held and applied solely as provided in this act.

Sec. 14. Marketability of bonds.

The Authority may exercise all or any part of combination of the powers granted by this act, including the power: To make covenants other than and in addition

to the covenants expressly authorized, of like, or different character; to make covenants and to do all acts as may be necessary, convenient, or desirable in order to secure its bonds or, in the absolute discretion of the Authority, as will tend to make the bonds more marketable, notwithstanding that the covenants or acts may not be enumerated in this act.

Sec. 15. Bonds as legal investments and security for public deposits.

Bonds issued by the Authority under the provisions of this act are securities in which all public officers and public bodies of the District, all insurance companies, trust companies, banking associations, investment companies, executors, administrators, trustees and other fiduciaries may properly and legally invest funds, including capital in their control or belonging to them. These bonds are securities that may properly and legally be deposited with and received by any municipal officer or any agency of the District for any purpose for which the deposit of bonds or obligations is now or may subsequently be authorized by law.

Sec. 16. Credits of the District not pledged.

Revenue bonds issued under the provisions of this act shall not constitute a debt of the District nor a pledge of the faith and credit of the District. The bonds shall be payable solely from funds provided for the bonds from revenues. The issuance of revenue bonds under the provisions of this act shall not directly, indirectly, or contingently obligate the District to any form of taxation whatever. All revenue bonds shall contain a statement on their face substantially to this effect.

Sec. 17. Trust agreement.

In the discretion of the Authority any bonds issued under the provisions of this act may be secured by a

trust agreement by and between the Authority and a corporate trustee, which may be any trust company or bank having the power of a trust company within or without the District. The trust agreement or the resolution providing for the issuance of the bonds may pledge or assign the fees and other revenues to be received, but shall not convey or mortgage the airports or any part of the airports. The trust agreement or resolution providing for the issuance of the bonds may contain provisions for protecting and enforcing the rights and remedies of the bondholders as may be reasonable and proper and not in violation of law, including covenants setting forth the duties of the Authority in relation to the acquisition of property and the construction, improvement, maintenance, repair, operation and insurance of the airports, the rates or fees or other charges to be charged, and the custody, safeguarding the application of all monies. It shall be lawful for any bank or trust company incorporated under the laws of the District that may act as depositary of the proceeds of bonds or of revenues to furnish indemnifying bonds or to pledge securities as may be required by the Authority. Any trust agreement may set forth the rights and remedies of the bondholders. In addition, any trust agreement or resolution may contain other provisions the Authority considers reasonable and proper for the security of the bondholders. All expenses incurred in carrying out the provisions of the trust agreement or resolution may be treated as a part of the cost of the operation of the airports.

Sec. 18. Revenues.

The Authority may fix, revise, charge, and collect fees or other charges for the use of the airports, contract with any person, partnership, association, or corporation desiring the use of any part of the airports, including the right-of-way adjoining the airports for placing on

the airports telephone, telegraph, electric light or power lines, and fix the terms, conditions, rents and fees or other charges for use. Fees or other charges shall be so fixed and adjusted in respect of the aggregate of fees or other charges from the airports as to provide a fund sufficient with other revenues, if any, (1) to pay the cost of maintaining, repairing and operating the airports, (2) to pay the principal of and interest on bonds as they become due and payable, and (3) to create reserves for these purposes. The fees and other charges and all other revenues derived from the airports, except the part as may be necessary to pay the cost of maintenance, repair, and operation and provide reserves as may be provided for in the resolution authorizing the issuance of the bonds or in the trust agreement securing the bonds, shall be set aside at regular intervals as may be provided in the resolution or the trust agreement in a sinking fund, which is pledged to, and charged with, the payment of the principal of and the interest on the bonds as they become due, and the redemption price or the purchase price of bonds retired by call or purchase as provided in the bonds. The pledge shall be valid and binding from the time when the pledge is made. The fees, other charges, and other revenues or other monies so pledged and subsequently received by the Authority shall immediately be subject to the lien of the pledge without any physical delivery of the lien or further act, and the lien of the pledge shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the Authority, irrespective of whether the parties have notice of the lien. Neither the resolution nor any trust agreement by which a pledge is created need be filed or recorded except in the records of the Authority. The use and disposition of monies to the credit of the sinking fund shall be subject to the provisions of the resolution authorizing the issuance of the bonds or of the trust agreement. Except as may otherwise be provided in the resolution or the

trust agreement, the sinking fund shall be a fund for all these bonds without distinction or priority of 1 over another.

Sec. 19. Trust funds.

All proceeds from the sale of bonds and revenues derived from the bonds received pursuant to the provisions of this act shall be considered to be trust funds to be held and applied solely as provided in this Act. The Authority may, in the resolution authorizing the bonds or in the trust agreement securing the bonds, provide for the payment of the proceeds of the sale of the bonds and the revenues of the Authority to a trustee, which may be any trust company or bank having the powers of a trust company within or without the District, which shall act as trustee of the funds, and hold and apply the funds to the purposes of this act, subject to any regulations this act and the resolution or trust agreement may provide. The trustee may invest and reinvest the funds in securities as may be provided in the resolution authorizing the bonds or in the trust agreement securing the bonds.

Sec. 20. Annual audit.

The Authority shall prepare financial statements at the end of each of its fiscal years in conformity with generally accepted accounting principles. These financial statements shall be examined annually by an independent certified public accountant in accordance with generally accepted auditing standards. Copies of each audit report shall be furnished to the Governor of the Commonwealth of Virginia and to the Mayor of the District not later than 120 days after the end of each fiscal year of the Authority and shall be open to public inspection.

Sec. 21. Remedies.

Any holder of bonds issued under the provisions of this act or of any of the coupons appertaining to the bonds,

and the trustee under any trust agreement, except to the extent the rights given by this act, may be restricted by the trust agreement, may either at law or in equity, by suit, action, injunction, mandamus or other proceedings, protect and enforce any and all rights under the laws of the District, or granted by this act or under the trust agreement or the resolution authorizing the issuance of the bonds and may enforce and compel the performance of all duties required by this act or by the agreement or resolution to be performed by the Authority or by any officer or agent of the Authority including the fixing, charging, and collection of fees or other charges.

Sec. 22. Exemption from taxation.

The exercise of the powers granted by this act shall be in all respects for the benefit of the inhabitants of the District for the increase of their commerce, and for the promotion of their safety, health, welfare, convenience, and prosperity, and as the operation and maintenance of the airports by the Authority will constitute the performance of essential governmental functions, the Authority shall not be required to pay any taxes or assessments upon the airports or any property acquired or used by the Authority under the provisions of this act or upon the income therefrom; and the bonds issued under the provisions of this act, their transfer and the income from the bonds, including any profit made on the sale of the bonds, shall at all times be free and exempt from taxation by the District.

Sec. 23. Jurisdiction of courts; liability for contracts and torts.

(a) The courts of the Commonwealth of Virginia shall have original jurisdiction over all actions brought by or against the Authority, which courts shall in all cases apply the law of the Commonwealth of Virginia.

(b) The Authority shall be liable for its contracts and for its torts and those of its members, officers, employees, and agents committed in the conduct of any proprietary function, in accordance with the law of the Commonwealth of Virginia but shall not be liable for any torts occurring in the performance of a governmental function. The exclusive remedy for breach of contracts and torts for which the Authority shall be liable, as provided by this act, shall be by suit against the Authority. Nothing in this act shall be construed as a waiver by the District or the Commonwealth of Virginia or its political subdivisions of any immunity from suit.

(c) The Authority shall be responsible for all executory contracts entered into by the United States with respect to the former Metropolitan Washington Airports before the date of acquisition of those airports, except that the procedure for disputes resolution contained in any contract shall continue to govern the performance of the contract unless otherwise agreed to by the parties to the contract.

(d) The Authority shall not be responsible for any tort claims arising before the date of transfer.

Sec. 24. Procurement exemption.

In light of the multi-jurisdictional nature of the Authority, an exemption is provided to the Authority from all laws and regulations of the District governing public procurement.

Sec. 25. Act liberally construed.

This Act, being necessary for the welfare of the District and its inhabitants, shall be liberally construed to effect its purposes.

Sec. 26. Constitutional construction.

The provisions of this act are severable and if any of its provisions are held unconstitutional by any court of

competent jurisdiction, the decision of that court shall not affect or impair any of the remaining provisions of this act. It is declared to be the legislative intent that this act would have been adopted had any unconstitutional provisions not been included.

Sec. 27. Inconsistent laws inapplicable.

All other general or special laws inconsistent with any provision of this act are declared to be inapplicable to the provisions of this act.

Sec. 28. Effective date.

This act shall take effect after a 30-day period of Congressional review following approval by the Mayor (or in the event of vote by the Mayor, action by the Council of the District of Columbia to override the veto) as provided in section 602(c)(1) of the District of Columbia Self-Government and Governmental Reorganization Act, approved December 24, 1973 (87 Stat. 813; D.C. Code, sec. 1-233(c)(1)), and upon the enactment into law by the Congress of the United States of legislation that authorizes and directs the sale, lease, or other disposition of the Metropolitan Washington Airports to an Airports Authority created by the legislatures of the Commonwealth of Virginia and the District pursuant to an agreement or compact that is consistent with the provisions of this act, whichever occurs later.

/s/ David A. Clarke
Chairman
Council of the District of Columbia

/s/ Marion Barry
Mayor
District of Columbia

APPROVED: October 9, 1985

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. Law 7-18

"District of Columbia Regional Airports Authority Act of 1985 Amendment Act of 1987".

Pursuant to Section 412 of the District of Columbia Self-Government and Governmental Reorganization Act, P.L. 93-198, "the Act", the Council of the District of Columbia adopted Bill No. 7-172 on first and second readings, April 14, 1987, and May 5, 1985, respectively. Following the signature of the Mayor on June 1, 1987, this legislation was assigned Act 7-32, published in the June 12, 1987, edition of the *D.C. Register,* (Vol. 34 page 3804) and transmitted to Congress on June 10, 1987, for a 30-days review, in accordance with Section 602(c)(1) of the Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional Review Period has expired, and therefore, cites this enactment as D.C. Law 7-18, effective July 25, 1987.

/s/ David A. Clarke
DAVID A. CLARKE
Chairman of the Council

Dates Counted During the 30-day Congressional Review Period:

June 10, 11, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, 30

July 1, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24

AN ACT

D.C. ACT 7-32

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

Jun. 01, 1987

To amend the District of Columbia Regional Airports Authority Act of 1985 to conform with legislation passed by the legislature of the Commonwealth of Virginia and by the United States Congress, to authorize the Metropolitan Washington Airports Authority to establish a board of review, and to establish civil penalties for violations of rules of the Metropolitan Washington Airports Authority.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "District of Columbia Regional Airports Authority Act of 1985 Amendment Act of 1987".

Sec. 2. Findings.

The Council of the District of Columbia ("Council") finds that:

(1) Congress adopted the Metropolitan Washington Airports Act of 1986, approved October 30, 1986 (100 Stat. 3341; 49 U.S.C. app. 2456) ("Airports Act"), which authorized the transfer of operating responsibility of Washington Dulles International Airport and Washington National Airport to a local authority under a 50-year lease.

(2) Section 6007 of the Airports Act requires that the powers and jurisdiction of the Metropolitan Washington Airports Authority be conferred jointly by the legislative authority of the Commonwealth of Virginia and the District of Columbia or by either of the jurisdictions and concurred in by the legislative authority of the other jurisdiction.

(3) The Council adopted legislation in 1985 which conformed to the original Virginia Statute authorizing a local authority, and it is therefore appropriate to adopt amendments in conformity with amendments recently approved by the legislature of the Commonwealth of Virginia in S. 672, 169 Leg., 1987 Sess. (1987) in response to the Airports Act.

Sec. 3. The District of Columbia Regional Airports Authority Act of 1985, effective December 3, 1985 (D.C. Law 6-67; D.C. Code, sec. 7-1101 note) ("District act"), is amended as follows:

(a) Section 2 is amended by striking in paragraph (2) the phrase "to be created by the legislatures of the Commonwealth of Virginia and the District pursuant to an agreement or compact that is consistent with the provisions of this act, or, if the Authority to be created is later abolished," and inserting in its place the phrase "created by this act and by similar enactment by the Commonwealth of Virginia, or if the Authority is abolished,".

(b) Section 5(h) is amended to read as follows:

"(h) The members of the Authority and its board of review, including any nonvoting members, shall not be personally liable for any act done or action taken in their capacities as members of the Authority or its board of review, nor shall they be personally liable for any bond, note, or other evidence of indebtedness issued by the Authority.".

(c) Section 6 is amended:

(1) By striking from paragraph (2) the second appearance of the word "operate";

(2) By inserting in paragraph (5) after the word "committees" the phrase "and to establish a board of review";

(3) By striking from paragraph (10) the phrase "However, the" and inserting in its place the phrase "Employees of the Authority shall not participate in any strike or assert any right to strike against the Authority, and any employment agreement entered into by the Authority shall contain an explicit prohibition against strikes by the employee or employees covered by such agreement. The";

(4) By inserting in paragraph (12) after the word "facilities" the phrase "consistent with the purposes of this act", and by striking from paragraph (12) after the word "Authority" the phrase "and consistent with the purposes of this act";

(5) By inserting in paragraph (13) after the word "users," the phrase "including contracts for normal governmental services on a reimbursable basis with local political subdivisions where the Authority facilities are situated and with the District of Columbia government,";

(6) By striking at the end of paragraph (14) the word "and";

(7) By adding a new paragraph (15a) to read as follows:

"(15a) To make payments to reimburse the local political subdivisions where the Authority facilities are situated for extraordinary law enforcement costs incurred by such localities; and"; and

(8) By adding a new subsection (a-1) to read as follows:

"(a-1) Pursuant to section 6007(b) of the Metropolitan Washington Airports Act of 1986, approved October 30, 1986 (100 Stat. 3341; 49 U.S.C. app. 2456), the Authority is established solely to operate and improve both metropolitan Washington airports as primary airports serving the metropolitan Washington area and shall be independent of the Commonwealth of Virginia and its local political subdivisions, the District of Columbia, and the federal government in the performance and exercise of the airport-related duties and powers enumerated in this section. Any conflict between the exercise of these enumerated powers by the Authority and the powers of any local political subdivision within which Authority facilities are situated shall be resolved in favor of the Authority.".

(d) Section 7 is amended:

(1) By striking in paragraph (b)(2) the phrase "in the political subdivision where the Authority's facilities are located and the District" and inserting in its place the phrase "in the District of Columbia and in the local political subdivisions of the Commonwealth of Virginia where the Authority facilities are located";

(2) By striking in subsection (d) the last sentence; and

(3) By adding new subsections (e), (f), (g), (h), and (i) to read as follows:

"(e) The violation of any rule or regulation of the Authority establishing a noise limitation on aircraft that operate at the Authority Facilities shall subject the violator, in the discretion of the circuit court of any political subdivision where the facility is located to a civil penalty not to exceed $2,500 for each violation. The penalty shall be paid to the Authority. With the consent of the violator or the accused violator of a rule establishing aircraft noise limits, the Authority may provide, in an order issued against the violator or accused violator, for the payment of civil charges in specific sums not to ex-

ceed the limit that could be imposed by the court. Such civil charge when paid shall be in lieu of any civil penalty that could be imposed by the court. Any court proceeding shall be within the exclusive jurisdiction of the circuit court and shall be a civil proceeding at law brought by the Authority.

"(f) The violation of any Authority rule or regulation, having the force and effect of law, shall be a Class 1 misdemeanor unless otherwise specified by chapter 598 of the 1985 Acts of Assembly or unless a lesser penalty is set by the Authority in the rule or regulation. The rules of criminal procedure and evidence that apply throughout the Commonwealth of Virginia ("Commonwealth") shall apply to the adjudication of any case involving the violation of any Authority rule or regulation having the force and effect of law.

"(g) The courts of the Commonwealth shall take judicial notice of the Authority's regularly adopted rules and regulations. For the convenience of the courts which may regularly hear cases arising under the Authority's rules and regulations, the Authority may certify to the clerk of such court a copy of its rules and regulations. Any such certification, when signed by the chairman of the Metropolitan Washington Airport Authority, shall be accepted as evidence of the facts therein stated.

"(h) With respect to the violation of any statute of the Commonwealth, local ordinance, or Authority rule or regulation having the force and effect of law occurring at the Authority Facilities:

"(1) The matter shall be within the jurisdiction of the state courts of the political subdivision where the violation occurred; violations occurring at Washington National Airport shall be within the jurisdiction of the courts for Arlington County;

"(2) The attorney for the Commonwealth shall have authority to prosecute those offenses in the name of the Commonwealth or local government as appropriate; and

the county or city attorney, if otherwise authorized to prosecute offenses in the name of the county or city, shall have authority to prosecute those offenses in the name of the county or city; and

"(3) Sheriffs and clerks of the court shall provide those same services and exercise those same powers with respect to Authority Facilities within their jurisdiction as for their political subdivisions.".

(e) Section 8 is amended to read as follows:

"Sec. 8. Police powers.

"(a) The Authority is authorized to establish and maintain a regular police force and to confer police powers to be exercised with respect to offenses occurring on the Authority Facilities upon its employees meeting the minimum requirements of the Commonwealth of Virginia's Department of Criminal Justice Services.

"(b) Such police officers shall have all powers vested in police officers under Chapter 3 of Title 15.1, Chapter 11 of Title 16.1, Title 18.2, and Title 46.1 of the Code of Virginia and shall be responsible upon the Authority Facilities and within 300 yards of the Facilities for enforcing the laws of the Commonwealth, the Authority's rules and regulations, and all other applicable ordinances, rules, and regulations.

"(c) The police officers may issue summons to appear, or arrest on view or on information without warrant as permitted by law, and conduct before any judicial officer of competent jurisdiction any person violating, upon Authority Facilities, any rule or regulation of the Authority, any ordinance or regulation of any local political subdivision, or any other law of the Commonwealth.

"(d) The Department of State Police shall exercise the same powers upon Authority Facilities as elsewhere in the Commonwealth.

"(e) The Authority may enter into reciprical or mutual aid agreements with the local political subdivisions in which the Authority Facilities are situated, any agency

of the Commonwealth, or of the federal government, or any combination of the foregoing, for cooperation in the furnishing of police services.

"(f) The police force of Arlington County shall have concurrent jurisdiction with the police force established herein at Washington National Airport. The Authority shall enter into an agreement with Arlington County regarding the exercise of police authority.

"(g) The sheriffs and police forces of Loudon and Fairfax Counties shall continue to exercise concurrent jurisdiction with the police force established herein over the Authority Facilities situated within their respective counties.".

(f) Section 28 is amended by striking the phrase "an Airports Authority created by the legislatures of the Commonwealth of Virginia and the District pursuant to an agreement or compact that consistent with the provisions of this act, whichever occurs later.", and inserting in its place the phrase "the Authority.".

Sec. 4. This act shall take effect after a 30-day period of Congressional review following approval by the Mayor (or in the event of veto by the Mayor, action by the Council of the District of Columbia to override the veto) as provided in section 602(c)(1) of the District of Columbia Self-Government and Governmental Reorganization Act, approved December 24, 1973 (87 Stat. 813; D.C. Code, sec. 1-233(c)(1)).

/s/ David Clarke
Chairman
Council of the District of Columbia

/s/ Marion Barry
Mayor
District of Columbia

Approved: June 1, 1987

LEASE

of the

METROPOLITAN WASHINGTON AIRPORTS

between

THE UNITED STATES OF AMERICA

acting by and through

THE SECRETARY OF TRANSPORTATION

and

THE METROPOLITAN WASHINGTON AIRPORTS AUTHORITY

ENTERED INTO AT WASHINGTON, DISTRICT OF COLUMBIA

THIS SECOND DAY OF MARCH, 1987

[In Relevant Part]

AGREEMENT
AND DEED OF LEASE
March 2, 1987

Agreement and Deed of Lease between the United States of America, acting by and through the Secretary of Transportation ("the Secretary"), and the Metropolitan Washington Airports Authority ("the Airports Authority"), a public body politic and corporate created by compact between the Commonwealth of Virginia and the District of Columbia with the consent of the Congress.

WHEREAS, in the Metropolitan Washington Airports Act of 1986, Title VI of Public Law 99-591 ("the Act"), the Congress declared its purpose to be to authorize the transfer of operating responsibility under a long-term lease of the Metropolitan Washington Airport properties as a unit, including access highways and other related facilities, to a properly constituted independent airport authority created by the Commonwealth of Virginia and the District of Columbia, in order to achieve local control, management, operation, and development of these important transportation assets;

WHEREAS, the Act authorized the Secretary to enter into such a lease in order to enable the financing of badly needed capital improvements;

WHEREAS, in Chapter 598, Virginia Acts of Assembly, 1985, as it may be amended, and in the District of Columbia Regional Airports Authority Act of 1985, D.C. Law 6-67, as it may be amended, the Commonwealth of Virginia and the District of Columbia, respectively, enacted essentially identical laws to create the Airports Authority to acquire the Metropolitan Washington Airports from the United States, by lease or otherwise;

WHEREAS, the Congress has found that the two federally owned airports in the metropolitan area of Washington, District of Columbia constitute an important and

growing part of the commerce, transportation and economic patterns of the Commonwealth of Virginia, the District of Columbia, and the surrounding region;

WHEREAS, the Congress has found that the Federal Government has a continuing but limited interest in the operation of the two federally owned airports serving the travel and cargo needs of the entire Metropolitan Washington region as well as the District of Columbia as the national seat of government;

WHEREAS, the Congress has found that operation of the Metropolitan Washington Airports by an independent local agency will facilitate timely improvements at both airports to meet the growing demand of interstate air transportation occasioned by the Airline Deregulation Act of 1978;

WHEREAS, the Congress has found that all other major air carrier airports in the United States are operated by public entities at the State, regional or local level;

WHEREAS, the Congress has found that any change in the status of the two airports must take into account the interest of nearby communities, the traveling public, air carriers, general aviation, airport employees, and other interested groups, as well as the interests of the Federal Government and the State governments involved;

WHEREAS, the Congress has found that an operating authority with representation from local jurisdictions, similar to authorities at all major airports in the United States, will improve communications with local officials and concerned residents regarding noise at the Metropolitan Washington Airports; and

WHEREAS, the Congress has found that the Federal interest in these airports can be provided through a lease mechanism which provides for local control and operation.

NOW THEREFORE, under the authority of the Metropolitan Washington Airports Act of 1986, Title VI of Public Law 99-591, 100 Stat. 3341; Chapter 598, Virginia

Acts of Assembly, 1985, as it may be amended; and the District of Columbia Regional Airiports Authority Act of 1985, D.C. Law 6-67, as it may be amended; the parties do hereby agree as follows, for themselves and for their successors:

Article 1. *Definitions.*

The following terms when used in this lease shall have the meanings indicated below:

1.A. Act

The term "Act" means the Metropolitan Washington Airports Act of 1986, Title VI of Public Law 99-591, 100 Stat. 3341.

1.B. Airports

The term "Airports" means the Metropolitan Washington Airports.

1.C. Airports Authority

The term "Airports Authority" means the Metropolitan Washington Airports Authority, a public body created by the Commonwealth of Virginia and the District of Columbia.

1.D. Airport Purposes

The term "Airport Purposes" means a use of property interests (other than a sale) for aviation business or activities, or for activities necessary or appropriate to serve passengers or cargo in air commerce, or for nonprofit, public use facilities.

1.E. Board of Directors

The term "Board of Directors" means the Board of Directors of the Airports Authority.

1.F. Board of Review

The term "Board of Review" means the Board of Review of the Airports Authority established by the Board of Directors.

1.G. Employees

The term "Employees" means all permanent Federal Aviation Administration personnel employed on the date this lease takes effect by the Metropolitan Washington Airports, an organization within the Federal Aviation Administration, U.S. Department of Transportation.

1.H. Leased Premises

The term "Leased Premises" means the real property described in paragraph 3.A. hereof.

1.I. Master Plan

The term "Master Plan" means a generalized, comprehensive plan for the physical development of Washington National Airport or Washington Dulles International Airport as may be revised from time to time by the Airports Authority.

1.J. Metropolitan Washington Airports

The term "Metropolitan Washington Airports means Washington National Airport and Washington Dulles International Airport.

1.K. Secretary

The term "Secretary" means the Secretary of Transportation of the United States, or her successor.

1.L. Washington Dulles International Airport

The term "Washington Dulles International Airport" means the airport constructed under the act entitled "An Act to auhorize the construction, protection, operation, and maintenance of a public airport in or in the vicinity of the District of Columbia", approved September 7, 1950 (64 Stat. 770), and includes the Dulles Airport Access Highway and Right-of-way, including the extension between the Interstate Routes I-495 and I-66.

1.M. Washington National Airport

The term "Washington National Airport" means the airport described in the act entitled "An Act to provide for the administration of the Washington National Airport, and for other purposes", approved June 29, 1940 (54 Stat. 686).

Article 2. *Purpose.*

The purpose of this lease is to transfer the operating responsibility for the Metropolitan Washington Airports to the Metropolitan Washington Airports Authority pursuant to the Act and to make the conditions imposed therein upon the authority of the Secretary to enter into a lease of the Metropolitan Washington Airports applicable to the Airports Authority.

Article 3. *Leased Premises.*

3.A. *Grant of Lease.*

The Secretary, on behalf of the United States of America, hereby demises and leases to the Airports Authority the two Metropolitan Washington Airport properties as a unit, including access highways and other related facilities, being the parcels of land, together with all right, title and interest, if any, of the Secretary in and to any street or road abutting or included within the described land, and all rights of way, easements, licenses and permits relating thereto, and all improvements thereon, bounded and described in *Appendix A.*

3.B. *Scope.*

The Airports Authority is hereby authorized to occupy, operate, control and use, for the term of this lease, all land, improvements, buildings, fixtures, easements, rights of ingress and egress and appurtenances thereto belonging, owned by, used or controlled by or assigned to the United States of America on or at the Leased Premises. Subject to the provisions of this lease, the Airports Authority shall have, consistent with the 50-year minimum

term of this lease, full power and dominion over, and complete discretion in, operations and development of the Airports, and shall have the same proprietary powers and be subject to the same restrictions with respect to federal law as any other airport, except as otherwise provided herein.

3.C. *Warranty of Title.*

The Secretary hereby warrants and covenants on behalf of the United States of America that the United States of America is the owner of good, fee simple and marketable title to all of the Leased Premises, free and clear of all liens, debts, encumbrances or restrictions of whatsoever kind, nature and description, other than leases and easements presently in effect that do not adversely affect the operation of the Airports, and the Secretary has full power and authority to convey the interests described in this lease in accordance with the provisions hereof.

3.D. *Quiet Enjoyment.*

The Secretary covenants on behalf of the United States of America that, during the period commencing on the effective date of this lease and ending on the expiration of the term of this lease in accordance with the terms hereof, the Airports Authority shall fully, peaceably and quietly occupy and enjoy the full possession of the Leased Premises without hinderance or interference by the Secretary or any other person or entity.

Article 4. *Transfer of Personal Property.*

The Secretary, on behalf of the United States of America, hereby grants, transfers and conveys to the Airports Authority, without condition (and not as a lease), all right, title and interest in and to all equipment, materials, furnishings and all other personal property appurtenant to or located on the Leased Premises, excluding personal property necessary for the Secretary's Air Traffic Control

responsibilities, and including, but not limited to, the items specifically described in the inventory to be completed before the effective date of this lease and identified as "Inventory for Metropolitan Washington Airports." Such personal property is transferred in "as is" condition and the Secretary makes no warranties as to the suitability of any such property for any particular use.

* * * *

Article 9. *Effective Date.*

This lease shall be effective on the date on which the Secretary and the Airports Authority certify that the Governor of Virginia and the Mayor of the District of Columbia have approved the lease and that all conditions in Articles 15 and 20 have been satisfied.

Article 10. *Term and Extensions.*

10.A. *Term.*

The term of this lease shall be for fifty years commencing on the effective date as determined under Article 9.

10.B. *Lease Extensions.*

The Secretary and the Airports Authority may at any time negotiate an extension of this lease.

10.C. *Good Faith Negotiation.*

In the event that the Airports Authority reasonably shall determine that an extension of the term of this lease is required in order to entitle the Airports Authority to amortize the indebtedness that will result from the financing of any improvements at the Airports over a period equal to the estimated useful life of such improvements, the parties agree to negotiate in good faith a commensurate extension of such term.

10.D. *Expiration.*

Upon the expiration of this lease, the Airports Authority covenants and agrees that it will give up, surrender

and deliver to the Secretary the Leased Premises together with all buildings, structures and improvements thereon (as the same may have been altered or replaced), as well as all personal property, furniture, fixtures and other equipment contained therein and used exclusively in connection with the operation of the Airports, the intent being that when the Leased Premises are returned to the Secretary, such Leased Premises shall be in good condition as operating airports, depreciation, obsolescence, and ordinary wear and tear excepted, all of which shall be free and clear of any and all liens, debts or encumbrances which would necessitate payment by the Secretary.

Article 11. *Continuing Obligations.*

11.A. *Airports Authority's Legal Status.*

The Airports Authority is a public body corporate and politic that meets the requirements of section 6007 of the Act. The Airports Authority agrees to refrain from action that would alter such status and to use its best efforts to maintain this status.

11.B. *Operation of Airports.*

The Airports Authority shall operate, maintain, protect, promote, and develop the Metropolitan Washington Airports as a unit and as primary airports serving the Metropolitan Washington area.

11.C *Airport Improvement Program Requirements*

The Airports Authority shall be subject to the requirements of section 511(a) of the Airport and Airway Improvement Act of 1982 (hereinafter the "1982 Act") and the assurances and conditions required of grant recipients under the 1982 Act as of the date the lease takes effect, to the same extent as would be an airport that received a grant under the 1982 Act on the effective date of this lease. As in the case of any other airport, any such assurance which, by its terms, is project specific shall

apply only to projects on which Federal grant funds are expended. Notwithstanding section 511(a)(12) of the 1982 Act, all revenues generated by the Metropolitan Washington Airports shall be expended for the capital and operating costs of the Airports.

11.D. *Contracts.*

In acquiring by contract supplies or services for an amount estimated to be in excess of $200,000, or awarding concession contracts, the Airports Authority shall obtain, to the maximum extent practicable, full and open competition through the use of published competitive procedures. By a vote of seven members, the Airports Authority may grant exceptions to the requirements of this paragraph.

11.E. *Continuation of Regulations.*

All regulations applicable to the Metropolitan Washington Airports and included in Part 159 of the Federal Aviation Regulations, 14 C.F.R. Part 159, on the effective date of this lease shall become regulations of the Airports Authority on that date and shall remain in effect until modified or revoked by the Airports Authority in accordance with procedures of the Airports Authority.

11.F. *Limitations on Aircraft Operations.*

(1) The Airports Authority shall not increase or decrease the number of instrument flight rule takeoffs and landings authorized by the High Density Rule (14 C.F.R. 93.121 et seq.) at Washington National Airport as in effect on October 18, 1986, and shall not, after the effective date of this lease, impose a limitation on the number of passengers taking off or landing at Washington National Airport.

(2) The Airports Authority agrees that any action changing or having the effect of changing the hours of operation of or the type of aircraft serving either of the Metropolitan Washington Airports may be taken only by

adoption of or amendment to regulations of the Airports Authority.

11.G. *Assumption of Rights, Liabilities and Obligations.*

(1) *In General.* Except as provided in subparagraph 2 of this paragraph, the Airports Authority hereby agrees that it shall assume all rights, liabilities, and obligations (tangible and incorporeal, present and executory) of the Secretary with respect to the Metropolitan Washington Airports organization of the Federal Aviation Administration on the effective date of this lease, including leases, permits, licenses, contracts, agreements, claims, tariffs, accounts receivable, accounts payable, and litigation relating to such rights and obligations, regardless whether judgment has been entered, damages, awarded, or appeal taken. To the extent practicable, the Secretary shall provide at the effective date of this lease a summary list of the foregoing which involve material obligations.

(2) *Exceptions.* The procedure for disputes resolution contained in any contract entered into on behalf of the United States before the effective date of this lease shall continue to govern the performance of the contract unless otherwise agreed to by the parties to the contract. Claims for monetary damages founded in tort, by or against the United States as the owner and operator of the Metropolitan Washington Airports, arising before the date the lease takes effect shall be adjudicated as if the lease had not been entered into.

(3) *Payments Into Employee Compensation Fund.* The Federal Aviation Administration, and not the Airports Authority, shall be responsible for reimbursing the Employees' Compensation Fund, pursuant to section 8147 of title 5, United States Code, for compensation paid or payable after the effective date of this lease in accordance with chapter 81 of title 5, United States Code, with regard to any injury, disability, or death due to events aris-

ing before such date, whether or not a claim has been filed or is final on such date.

11.H. *Use of Certain Revenues.*

No landing fee imposed for operating an aircraft or revenues derived from parking automobiles—

(1) at Washington Dulles International Airport may be used for maintenance or operating expenses (excluding debt service, depreciation, and amortization) at Washington National Airport; or

(2) at Washington National Airport may be used for maintenance or operating expenses (excluding debt service, depreciation, and amortization) at Washington Dulles International Airport.

11.I. *General Aviation Fees.*

The Airports Authority shall compute the fees and charges for landing general aviation aircraft at the Metropolitan Washington Airports on the same basis as the landing fees for air carrier aircraft, except that the Airports Authority may require a minimum landing fee not in excess of the landing fee for aircraft weighing 12,500 pounds.

11.J. *Reporting Requirement.*

The Airports Authority agrees to provide annually to the Secretary a written report of any demolition during the previous year of structures conveyed under this lease.

Article 12. *Capital Improvements.*

12.A. *Master Plans.*

The Airports Authority shall assume responsibility for the Federal Aviation Administration's Master Plans for the Metropolitan Washington Airports, including the adoption of the Dulles Master Plan and the Completion of a Master Plan for Washington National Airport, and may revise such Master Plans from time to time or

adopt subsequent Master Plans for the development of the Airports. Major improvements to the Airports shall be consistent with the most recently adopted Master Plans.

12.B. *Improvement Schedule.*

The Airports Authority acknowledges its intent, to the extent practicable, to:

(1) pursue the improvement, construction and rehabilitation of the facilities at Washington Dulles International Airport and Washington National Airport simultaneously; and

(2) cause the improvement, construction, and rehabilitation proposed by the Secretary to be completed at both of such Airports within five years of the earliest date on which the Airports Authority issues bonds or other long-term evidences of indebtedness.

Article 13. *Board of Review.*

13.A. *Establishment and Composition.*

Before taking any actions listed in paragraph 13.D. of this Article, the Board of Directors shall establish a nine-member Board of Review of the Airports Authority and appoint to it representatives of the users of the Metropolitan Washington Airports who will serve in their individual capacities. The Board of Directors shall appoint:

(1) two members of the Public Works and Transportation Committee and two members of the Appropriations Committee of the U.S. House of Representatives from a list or lists of recommended appointees provided by the Speaker of the House;

(2) two members of the Commerce, Science, and Transportation Committee and two members of the Appropriations Committee of the U.S. Senate from a list or lists of recommended appointees provided by the President pro tempore of the U.S. Senate; and

(3) one member chosen alternatively from a list provided by the Speaker of the House or the President pro tempore of the Senate, respectively.

The members of the Board of Review shall elect a chairman. The Board of Directors may not appoint a member of the House of Representatives or the Senate from Maryland or Virginia, or the Delegate from the District of Columbia, to the Board of Review.

13.B. *Terms.*

Members of the Board of Review appointed under subparagraphs (1) and (2) of paragraph 13.A. above shall be appointed for six years, except that of the members first appointed, one member under each of subparagraphs (1) and (2) shall be appointed for a term of two years and one member under each of subparagraphs (1) and (2) shall be appointed for a term of four years. Members of the Board of Review appointed under subparagraph (3) of paragraph 13.A. shall be appointed for terms of two years. A vacancy in the Board of Review shall be filled in the same manner in which the original appointment was made. Any member appointed to fill a vacancy before the expiration of the term for which his or her predecessor was appointed shall be appointed only for the remainder of such term.

13.C. *Procedures.*

The Board of Review shall establish procedures for conducting its business. The procedures may include requirements for a quorum at meetings and for proxy voting. The Board of Review shall meet at least once each year and shall meet at the call of the chairman or three members of the Board. Any decision of the Board of Review under paragraph 13.D. or 13.F. shall be by a vote of five members.

13.D. *Disapproval Procedure.*

The Board of Directors shall submit the following actions to the Board of Review at least thirty days (or at

least sixty days in the case of the annual budget) before they are to become effective:

(1) the adoption of an annual budget;

(2) the authorization for the issuance of bonds;

(3) the adoption, amendment, or repeal of a regulation;

(4) the adoption or revision of a Master Plan, including any proposal for land acquisition; and

(5) the appointment of the chief executive officer.

If the Board of Review does not disapprove an action within thirty days of its submission under this Article, the action may take effect. If the Board of Review disapproves any such action, it shall notify the Board of Directors and shall give reasons for the disapproval, and that action shall not take effect. Unless an annual budget for a fiscal year has taken effect in accordance with paragraph 13.D., the Airports Authority shall not obligate or expend any money in such fiscal year, except for (1) debt service on previously authorized obligations, and (2) obligations and expenditures for previously authorized capital expenditures and routine operating expenses.

13.E. *Request for Consideration of Other Matters.*

The Board of Review may request the Board of Directors to consider and vote, or to report, on any matter related to the Metropolitan Washington Airports. Upon receipt of such a request the Board of Directors shall consider and vote, or report, on the matter as promptly as feasible.

13.F. *Participation in Meetings of the Airports Authority.*

Members of the Board of Review shall be permitted to participate as nonvoting members in meetings of the Board of Directors.

13.G. *Staff.*

The Board of Review may hire two staff persons to be paid by the Airports Authority. The Airports Authority shall provide such clerical and support staff as the Board of Review may require. All such staff shall be employees of the Airports Authority.

13.H. *Effect of Litigation.*

The Airports Authority agrees that if the Board of Review is unable to carry out its functions described in this Article by reason of a judicial order, the Airports Authority will not take any action that must be submitted to the Board of Review under paragraph 13.D. above.

* * * *

Article 16. *Payments.*

16.A. *Lease Payments.*

The Airports Authority shall pay an annual rental to the account of the United States Treasury. For the first year of this lease, such annual rental shall be $3,000,000. Subsequent annual rental payments shall be adjusted as of each anniversary of the effective date of this lease so as to equal $3,000,000.00 in 1987 dollars by applying the Implicit Price Deflator for the Gross National Product published by the Department of Commerce in the March edition of the Survey of Current Business, or the appropriate successor index, as determined by the Secretary of Commerce. The parties may renegotiate the level of lease payments attributable to inflation costs every ten years. Lease payments shall be made from any moneys of the Authority legally available for such purpose, after the Authority shall have first (i) satisfied its contractual obligations in respect of debt service on its bonds and other indebtedness and (ii) paid or set aside the amounts required for payment of the operating and maintenance expenses of the Airports. Subject to the foregoing, the Airports Authority shall make lease

payments in semiannual installments commencing six months after the effective date of this lease. At the end of each month, the Airports Authority shall direct available funds into a reserve of the Airports Authority for purposes of making such lease payments, intended to accumulate on as equal a basis as possible the amounts due on the next lease payment date, which reserve shall be deposited in interest-bearing accounts or investment selected by the Airports Authority, with the rent payment and the interest actually accrued on the reserve account to be payable to the Treasury on the next lease payment date.

16.B. *Retirement Obligations.*

(1) Not later than one year after the effective date of this lease, the Airports Authority shall pay to the account of the United States Treasury an amount determined by the Office of Personnel Management to represent the actual added costs incurred by the Civil Service Retirement and Disability Fund due to discontinued service retirement under section 8336(d)(1) of Title 5, United States Code, of Employees who elect not to transfer to the Airports Authority.

(2) Not later than one year after the effective date of this lease, the Airports Authority shall pay to the Treasury of the United States an amount determined by the Office of Personnel Management to represent the present value of the difference between (a) the future cost of benefits payable from the Civil Service Retirement and Disability Fund and due the Employees covered under section 6008(e) of the Act that are attributable to the period of employment following the effective date of this lease, and (b) the contributions made by the Employees and the Airports Authority under section 6008(e) of the Act. In determining the amount due, the Office of Personnel Management shall take into consideration the actual interest such amount can be expected to earn when invested in the Treasury of the United States.

16.C. *Delinquent Payments.*

In the event payments under this lease are delinquent so as to constitute an Event of Default under subparagraph B.(1) of Article 23, the Secretary may, in addition to other rights available under this lease, assess interest at the Treasury Current Value of Funds Rate as prescribed by the Secretary of the Treasury on the date payment was due. In addition to this interest, penalty charges not to exceed six percent per year shall be assessed on any portion of a payment which is over 90 days past delinquent. Penalty charges shall accrue from the date the payment became delinquent and shall continue to accrue until payment is received. Delinquent payments may be collected by administrative offset whenever possible.

* * * *

Article 19. *Hold Harmless.*

To the extent permitted by applicable law, the Airports Authority shall indemnify, defend, and hold harmless the Secretary, her agents and employees, from any and all claims, liability, damage and expense incurred by reason of death, injury, loss or damage of or to persons or property arising out of the Airport Authority's operation, use and occupancy of the Metropolitan Washington Airports after the effective date of this lease. As between the parties hereto, the Airports Authority assumes all risk and liability for itself, its agents, employees, or contractors for any injury to persons or property resulting in any manner from the conduct of its operations, and the operations of its agents, or employees, and for any loss, cost, damage or expense resulting at any time from any cause due to any act or acts, negligence, or the failure to exercise proper precautions, of or by itself or its agents, or its employees, while occupying or operating the Metropolitan Washington Airports. Nothing herein shall be construed to indemnify the Secretary, her agents and employees for claims, liability, damage

and expense arising in whole or in part from their own negligent or intentional acts or omissions.

* * * *

Article 22. *No Assignment.*

The Airports Authority shall not, through assignment of this lease or otherwise, substitute any other person for the Airports Authority as the party obligated as the tenant under this lease. Notwithstanding the foregoing, the Airports Authority shall be entitled from time to time and in its discretion to create easements, grant licenses, and sublease portions of the Leased Premises for use by subtenants, for purposes consistent with, and subject to the provisions of, this lease. No such sublease shall relieve the Airports Authority from any of its obligations pursuant to this lease.

Article 23. *Defaults, Events of Defaults and Remedies.*

23.A. *Defaults.*

Each of the following shall constitute a default by the Airports Authority:

(1) failure by the Airports Authority to pay when due any lease payment required to be made by Article 16 hereof;

(2) use of the Leased Premises for other than Airport Purposes; and

(3) breach by the Airports Authority of any provision, other than those covered above, of this lease.

23.B. *Events of Default.*

Each of the following shall constitute an Event of Default:

(1) the continuation of a default described in subparagraph A.(1) of this Article for 30 days after the due date of such payment;

(2) the continuation of a default described in subparagraph A.(2) of this Article for 30 days after the receipt by the Airports Authority of a written notice from the Secretary specifying the claimed default, the affected portion of the Leased Premises, and the nature of the uses asserted not to be for Airport Purposes, provided that no Event of Default shall occur if the Airports Authority shall in good faith have commenced, within such 30 day period, to remedy such default and shall diligently and continuously proceed to cure such default; or

(3) the continuation of a default described in subparagraph A.(3) of this Article for 30 days after the receipt by the Airports Authority of a written notice from the Secretary specifying the claimed default, provided that no Event of Default shall occur if the Airports Authority shall in good faith have commenced, within such 30 day period, to remedy such default and shall diligently and continuously proceed to cure such default.

23.C. *Remedies.*

Upon the occurrence and during the continuation of any Event of Default

(1) described in subparagraph B.(1) or B.(3), of this Article, the Secretary may request the Attorney General to bring an appropriate action to compel the Airports Authority and its officers and employees to comply with the terms of this lease, and

(2) described in subparagraph B.(2) of this Article, the Secretary shall (a) direct that appropriate measures be taken by the Airports Authority to bring the use of such portion of the Leased Premises in conformity with Airport Purposes, and (b) retake possession of such portion of Leased Premises if the Airports Authority fails to bring the use of such portion into a conforming

use within a reasonable period of time, as determined by the Secretary.

23.D. *Rights and Remedies.*

The rights and remedies of the Secretary in this Article are exclusive of any other rights and remedies.

Article 24. *Disputes.*

24.A. *Litigation Procedure.*

Under section 6005(e) of the Act, the district courts of the United States shall have jurisdiction to compel the Airports Authority and its officers and employees to comply with the terms of this lease. An action may be brought on behalf of the United States by the Attorney General, or by any aggrieved party. An action to enforce the terms and conditions of this lease may also be brought on behalf of the Airports Authority in a district court of the United States.

Except as a court may order or the parties to this lease may otherwise agree in writing, pending resolution of any action under this Article, the parties shall proceed diligently with performance of all obligations under this lease.

24.B. *Litigation Records.*

Records relating to matters litigated under this Article or to litigation or the settlement of claims arising under or relating to this lease shall be retained until such litigation (including any appeals) or claims are disposed of.

* * * *

Article 27. *Lease Not Affected by Oral Agreement.*

No oral statement of any person shall modify or otherwise affect the terms, conditions, or limitations stated in this lease. All modifications to this lease must be made in writing by the Secretary and the Airports Authority or their authorized representatives.

Article 28. *Law of Agreement.*

This lease shall be governed by and construed in accordance with federal law. To the extent that the application of federal law requires or permits the application or consideration of state law, the parties agree that the law of the Commonwealth of Virginia is most relevant to this lease and shall be applied or considered. The powers of the Secretary with respect to this lease shall be construed in accordance with and governed by Federal law, and the powers of the Airports Authority with respect to this lease shall be construed in accordance with and governed by Virginia law.

Article 29. *No Waiver.*

No failure by either party to insist upon the strict performance of any agreement, term, covenant or condition hereof or to exercise any right or remedy consequent upon a breach thereof, and no payment or acceptance of full or partial payments during the continuance of any such breach, shall constitute a waiver of any such breach or of such agreement, term, covenant or condition. No waiver of any breach shall affect or alter this lease, but each and every agreement, term, covenant and condition hereof shall continue in full force and effect with respect to any other then-existing or subsequent breach thereof.

Article 30. *Captions.*

The captions and headings in this lease are inserted only as a matter of convenience and for reference, and they in no way define, limit or describe the scope of this lease or the intent of any provision thereof.

Article 31. *Partial Invalidity.*

If any term or provision of this lease, or the application thereof to any person or circumstance, shall to any extent be determined by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this

lease, or the application of such term or provision to persons or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each term and provision of the lease shall be valid and be enforced to the fullest extent permitted by law.

Article 32. *Certificate of the Secretary.*

The Secretary agrees to execute and deliver to the Airports Authority and/or any other person or entity designated by the Airports Authority, at any time and from time to time, upon not less than 30 days' prior written notice by the Airports Authority (which notice shall state that the Airports Authority requires same in connection with a financing or other undertaking), a statement in writing:

(i) certifying that this lease is unmodified and in full force and effect (or if there have been modifications, that the lease is in full force and effect as modified and stating the modifications);

(ii) stating the dates to which lease payments and other charges hereunder have been paid by the Airports Authority;

(iii) stating whether, to the best knowledge of the Secretary, the Airports Authority is in default in the performance of any covenant, agreement or condition contained in this lease, and if so, specifying the nature of such default; and

(iv) stating the address to which notices to the Secretary are to be sent.

Any such statement delivered by the Secretary may be relied upon by any lender, bond holder, trustee or other person proposing to enter into agreements with the Airports Authority as an estoppel of the Secretary's right to assert a position inconsistent with such position.

* * * *

Article 35. *Memorandum of Lease.*

Upon the request of the Airports Authority, the Secretary agrees to execute, in recordable form, a short-form memorandum of this lease, which memorandum may be recorded at the Airports Authority's expense in appropriate land records.

ENTERED INTO THIS SECOND DAY OF MARCH, 1987

For the United States of America:

/s/ Elizabeth Hanford Dole
ELIZABETH HANFORD DOLE
Secretary of Transportation

For the Metropolitan Washington Airports Authority:

/s/ Linwood Holton
A. LINWOOD HOLTON, JR.
Chairman, Board of Directors

[Notary Stamp Omitted in Printing]

APPROVED, pursuant to section 3 of Chapter 598, Virginia Acts of Assembly, 1985 Session:

/s/ Gerald L. Baliles
GERALD L. BALILES
Governor of Virginia

APPROVED, pursuant to section 4 of D.C. Law 6-67:

/s/ Marion Barry, Jr.
MARION BARRY, JR.
Mayor of the District of Columbia

AMENDMENT NO. 1

to the

LEASE

of the

METROPOLITAN WASHINGTON AIRPORTS

between

THE UNITED STATES OF AMERICA

acting by and through

THE SECRETARY OF TRANSPORTATION

and

THE METROPOLITAN WASHINGTON
AIRPORTS AUTHORITY

WHEREAS, the Metropolitan Washington Airports Authority (the "Airports Authority") and the United States of America, acting by and through the Secretary of Transportation (the "Secretary"), entered into a lease dated March 2, 1987 (the "Lease"), whereby the Secretary leased to the Airports Authority Washington National Airport and Washington Dulles International Airport (the "Metropolitan Washington Airports") for a term of fifty (50) years, effective June 7, 1987;

WHEREAS, the Airports Authority has a continuing obligation to comply with the Act;

WHEREAS, The Act has been amended and it is necessary to clarify that the Airports Authority's obligation extends to the Act as amended;

IT IS NOW, THEREFORE, agreed that the Lease is amended as follows:

1. In Article 1, Definitions, paragraph 1.A. "Act" is amended by inserting at the end thereof, the words "as amended by Title VII of Public Law 102-240."

2. In Article 11, paragraphs 11.A. through 11.J. are redesignated as paragraphs 11.B. through 11.K.

3. In Article 11, add new paragraph 11.A. to read as follows:

   "11.A. *Obligation to Comply with the Act.*

   The Airports Authority agrees to comply with the conditions imposed by the Act."

4. Article 13 is deleted in its entirety.

All other provisions of the Lease shall remain unchanged.

ENTERED INTO THIS 30th DAY OF DECEMBER, 1991

For the United States of America:

/s/ James B. Busey
ADMIRAL JAMES B. BUSEY
Acting Secretary of Transportation

For the Metropolitan Washington Airports Authority:

/s/ A. Linwood Holton, Jr.
A. LINWOOD HOLTON, JR.
Chairman, Board of Directors

APPROVED, pursuant to section 3 of Chapter 598, Virginia Acts of Assembly, 1985 Session:

THE HONORABLE L. DOUGLAS WILDER
Governor of Virginia

APPROVED, pursuant to section 4 of D.C. Law 6-67:

/s/ Sharon Pratt Kelly
THE HONORABLE SHARON PRATT KELLY
Mayor of the District of Columbia

APPROVED, pursuant to section 3 of Chapter 598, Virginia Acts of Assembly, 1985 Session:

/s/ L. Douglas Wilder
THE HONORABLE L. DOUGLAS WILDER
Governor of Virginia

APPROVED, pursuant to section 4 of D.C. Law 6-67:

THE HONORABLE SHARON PRATT KELLY
Mayor of the District of Columbia

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY

44 Canal Center Plaza
Alexandria, Virginia 22314-1562

BYLAWS

ARTICLE I

Organization of the Authority

Section 1. *Board of Directors.* As created on October 18, 1986, by Chapter 598 of the 1985 Virginia Acts of Assembly, as amended, and the Regional Airports Authority Act of 1985, D.C. Law 6-67, as amended, the Metropolitan Washington Airports Authority consists of eleven members. All powers, rights and duties of the Authority are thus conferred upon its members, who are collectively known as "the Board of Directors", hereinafter referred to as "the Board." Individual members of the Authority are known as "Directors."

a. There shall be eleven Directors: five appointed by the Governor of the Commonwealth of Virginia, three appointed by the Mayor of the District of Columbia, two appointed by the Governor of the State of Maryland, and one appointed by the President of the United States.

b. Directors shall (i) not hold elective or appointive public office, (ii) serve without compensation except that the Directors shall be entitled to reimbursement of their expenses incurred in attendance upon the meetings of the Authority or while otherwise engaged in the discharge of their duties, and (iii) reside within the Washington Standard Metropolitan Statistical Area, except that the Director appointed by the President of the United States shall not be required to reside in that area.

c. Appointments to the Authority shall be for a period of six years. However, initial appointments shall be made as provided by law.

d. Each Director may be removed or suspended from office only for cause, and in accordance with the laws of the jurisdiction from which he or she is appointed.

e. The Directors shall continue to serve until their successors shall be duly appointed and qualified. Any person appointed to fill a vacancy shall serve for the unexpired term. Any Director shall be eligible for re-appointment for one term.

Section 2. *Officers.* The Board shall annually elect from its membership a Chairman and Vice-Chairman and may elect from its membership, or appoint or employ from its staff, a Secretary and a Treasurer or a Secretary/Treasurer, and prescribe the powers and duties of each officer, and it may appoint from the staff an Assistant Secretary and an Assistant Treasurer, or an Assistant Secretary/Treasurer, who shall, in addition to other duties, discharge such functions of the Secretary and Treasurer, respectively, as may be directed by the Board. The Chairman and the Vice-Chairman may use any reasonable titles of their own choosing, such as Chair, Chairwoman, or Chairperson.

Section 3. *Term of Office.* All officers, as long as they continue to serve as a Director or staff, shall hold office until the next annual meeting of the Board, or until their successors are elected or appointed and qualified, whichever may be the later.

Section 4. *Standing Committees.* There shall be three standing Committees, on Finance, Operations and Planning.

ARTICLE II

Duties of the Board

The Board shall provide direction to the Authority in order to acquire, maintain, develop, promote and protect

Washington National and Washington Dulles International Airports. The Board shall promote good air transportation facilities with timely improvements at both Airports. The Board shall see that the laws pertaining to the purposes and functions of the Authority are faithfully observed and executed. The Board will employ staff and adopt appropriate procedures to carry out these duties.

ARTICLE III

Powers and Duties of the Officers of the Board

Section 1. *The Chairman.* The Chairman shall preside at all meetings of the Board; shall establish and appoint all Committees and the Chairmen thereof; shall determine the jurisdiction of all Committees; shall serve as an *ex officio* member of all Committees; shall execute documents on behalf of the Authority as prescribed by the Board; and shall perform such other duties as the Board may from time to time direct.

Section 2. *The Vice-Chairman.* The Vice-Chairman shall perform the duties and have the powers of the Chairman during the absence or incapacity of the Chairman from any cause. A certification by any six Directors as to such absence or incapacity from any regular or special meeting shall be conclusive evidence thereof.

Section 3. *The Secretary.* The Secretary shall be the custodian of all records and of the Seal of the Authority and shall keep accurate minutes of the meetings of the Board and its Committees. The Secretary shall have the authority to cause copies to be made of all minutes and other records and documents of the Authority and to certify under the official seal of the Authority that such copies are true copies. The Secretary shall affix the Seal of the Authority to legal instruments and documents as required. Secretary shall cause notice to be given to all meetings of the Authority as required by law or by these Bylaws and distribute the agenda and related materials

not less than 48 hours before the regular meetings of the Board. The Secretary, if a Director, shall become, *ex officio*, the Acting Chairman in the event the offices of the Chairman and Vice-Chairman are both vacant, or in the event that the Chairman and the Vice-Chairman are both unable to perform their duties by reason of absence or incapacity.

Section 4. *The Treasurer.* Except as may be required in any instrument under which any revenue or other bonds are issued by the Authority, the Treasurer shall have the care and custody of and shall be responsible for all monies of the Authority from whatever sources received. The Treasurer shall be responsible for the deposit of such monies in the name of the Authority in a bank or banks approved by the Board and shall be responsible for disbursements of such funds for purposes authorized or intended by the Board. The Treasurer, and any Assistant Treasurer, shall be bonded in an amount and with surety acceptable to the Board and shall make periodic accounting for all such funds as determined by the Board. The Treasurer's books shall be available for inspection by any Director of the Board during business hours.

Section 5. *Other Duties.* In addition to the duties and powers herein set forth, the Chairman, the Vice Chairman, the Secretary and the Treasurer shall each have the duties and powers as are commonly incident to their offices and such duties as may be imposed by law or as the Authority may from time to time by resolution specify.

ARTICLE IV

Board of Review

Section 1. *Establishment and composition.* There is hereby established a Board of Review of the Airports Authority to represent the interests of users of the Metropolitan Washington Airports. This Board has the re-

sponsibility of reviewing certain actions taken by the Board of Directors, as set forth below. The Board of Review shall be composed of nine Members, appointed by the Board of Directors as follows:

a. Four individuals from a list provided by the Speaker of the House of Representatives;

b. Four individuals from a list provided by the President *pro tempore* of the Senate; and

c. One individual chosen alternatively from a list provided by the Speaker of the House of Representatives and from a list provided by the President *pro tempore* of the Senate.

d. The Board of Directors may request additional recommendations from the Speaker and the President *pro tempore*.

Section 2. *Qualifications.* Members of the Board of Review shall be individuals who have experience in aviation matters and in addressing the needs of airport users, and who themselves are frequent users of either or both of the Metropolitan Washington Airports. A Member of the Board of Review shall be a registered voter of a jurisdiction other than Maryland, Virginia, or the District of Columbia.

Section 3. *Terms.* Members of the Board of Review shall be appointed for six years. Members of the Board of Review appointed under paragraph c. of section 1 shall be appointed for terms of two years. The Board of Directors shall fill a vacancy on the Board of Review in the same manner in which the original appointment was made. Any Member appointed to fill a vacancy before the expiration of the term for which the Member's predecessor was appointed shall be appointed only for the remainder of such term.

Section 4. *Removal.* Members of the Board of Review are subject to removal only for cause by a two-thirds vote of the Board of Directors.

Section 5. *Effect of more than four vacancies.* At any time that the Board of Review has more than four vacancies and lists have been provided for appointments to fill such vacancies, the Authority will not take any of the actions required under section 7 below to be submitted to the Board of Review.

Section 6. *Procedures.* The Board of Review shall establish procedures for conducting its business. The procedures may include requirements for a quorum at meetings, for voting by proxy, and for the selection of a Chairman. Proxies may be given only to other Members of the Board of Review. The Board of Review shall meet at least once each year and shall meet at the call of its Chairman or three of its Members. With at least one week's notice, the Board of Directors may also call meetings of the Board of Review. Any recommendation of the Board of Review under section 7 and any request under section 11 shall be by a vote of five members.

Section 7. *Review procedure.* The Board of Directors shall submit the following actions to the Board of Review at least thirty days (or at least sixty days in the case of the annual budget) before they are to become effective:

a. the adoption of an annual budget, and any amendments thereto;

b. the authorization for the issuance of bonds and an annual plan for the issuance of bonds and any amendments to such plan;

c. the adoption, amendment, or repeal of a regulation;

d. the adoption or revision of a master plan;

e. the appointment of the chief executive officer;

f. the award of a contract (other than a contract in connection with the issuance or sale of bonds which

is executed within thirty days of the date of issuance of the bonds) which has been approved by the Board of Directors;

g. any action of the Board of Directors approving a terminal design or airport layout or modification of such design or layout; and

h. the authorization for the acquisition or disposal of land and the grant of a long-term easement.

The Board of Review may make recommendations to the Board of Directors regarding an action (1) within thirty calendar days of its submission or (2) ten calendar days (excluding Saturdays, and holidays, and any day on which neither House of Congress is in session because of an adjournment *sine die,* a recess of more than three days, or an adjournment of more than three days) of its submission, whichever period is longer. Such recommendations may include a recommendation that the action not take effect. If the Board of Review does not make a recommendation in the applicable review period under this section, or if at any time in such review period the Board of Review decides that it will not make a recommendation on an action, the action may take effect.

Section 8. *Effect of recommendation.* An action with respect to which the Board of Review has made a recommendation in accordance with section 7 may only take effect if the Board of Directors adopts such recommendation or if the Board of Directors has evaluated and responded, in writing, to the Board of Review with respect to such recommendation and transmits such action, evaluation, and response to the Congress in accordance with section 9 and the sixty-calendar-day period prescribed in section 9 expires.

Section 9. *Nonadoption of recommendation.* If the Board of Directors does not adopt a recommendation of the Board of Review regarding an action, the Board of Directors shall transmit to the Speaker of the House of

Representatives and the President of the Senate a detailed description of the action, the recommendation of the Board of Review regarding the action, and the evaluation and response of the Board of Directors to such recommendation, and the action may not take effect until the expiration of sixty calendar days (excluding Saturdays, Sundays, and holidays, and any day on which neither House of Congress is in session because of an adjournment *sine die*, a recess of more than three days, or an adjournment of more than three days) beginning on the day on which the Board of Directors makes such transmission to the Speaker of the House of Representatives and the President of the Senate.

Section 10. *Limitation on expenditures.* Unless an annual budget for a fiscal year has taken effect in accordance with either section 7 or 9, the Authority shall not obligate or expend any money in such fiscal year, except for (1) debt service on previously authorized obligations, and (2) obligations and expenditures for previously authorized capital expenditures and routine operating expenses.

Section 11. *Request for consideration of other matters.* The Board of Review may request the Board of Directors to consider and vote, or to report, on any matter related to the Metropolitan Washington Airports. Upon receipt of such a request, the Board of Directors will consider and vote, or report, on the matter as promptly as feasible.

Section 12. *Participation in meetings of the Board of Directors.* Members of the Board of Review may participate as nonvoting members in meetings of the Board of Directors.

Section 13. *Staff.* The Board of Review may hire two staff persons to be paid by the Authority. The Authority shall provide such clerical and support staff as the Board of Review may require. The staff shall be employees of the Authority.

Section 14. *Limitation on Board actions.* If the Board of Review is unable to function as described in this

Article by reason of a judicial order, the Board of Directors thereafter may not take any actions that must be submitted to the Board of Review under section 7, but may continue to take all actions other than those that must be submitted.

ARTICLE V

Chief Executive Officer, and Other Employees

Section 1. *Chief Executive Officer.* The Board shall appoint a Chief Executive Officer who shall be the Chief Executive Officer of the Authority. He or she shall, except as otherwise provided by the Board, be in charge of management and all operations of the Airports and any other activities of the Authority as prescribed by the Board. The Chief Executive Officer shall sign documents on behalf of the Authority as prescribed by the Board. The Chief Executive Officer shall discharge his or her duties as directed by the Board.

Section 2. *Employees.* The Chief Executive Officer shall present the Board with a plan for staffing the Authority. All selections for positions reporting directly to the Chief Executive Officer shall be subject to approval by the Board.

ARTICLE VI

Offices, Books and Records

Section 1. *Offices.* The Board shall establish the principal office of the Authority at or near either Washington National Airport or Washington Dulles International Airport.

Section 2. *Books and Records.* Except as may be otherwise required or permitted by resolution of the Board, or as the business of the Authority may from time to time require, all of the books and records of the Authority shall be kept at its principal office. Such books and records shall be available during ordinary business hours for inspection by any member of the public.

Section 3. *Minutes.* All approved minutes of Board or Committee meetings other than those of an executive session shall be open to public inspection during ordinary business hours.

ARTICLE VII

Meetings of the Board

Section 1. *Meetings Open to the Public.* All meetings of the Board and its Committees shall be open to the public, except during executive sessions.

Section 2. *Regular Meetings.* A regular meeting of the Board shall be held without call or formal notice at the principal office of the Authority on the first Wednesday of every month at 9 a.m., except that in any case in which such day shall be a legal holiday, or for any other reason inappropriate as a meeting day, the regular meeting shall be held on such other day as may be determined by at least six Directors after consultation with all of the Directors and upon the provision of seventy-two hours notice to the Secretary. The Secretary shall notify all of the Directors upon receipt of such notice.

Section 3. *Annual Meeting.* The regular meeting held in the month of September in each year shall be the annual meeting for the election of a Chairman, Vice-Chairman, Secretary and a Treasurer. If the annual meeting is omitted, a special meeting shall be held in lieu thereof as soon as practicable, and all elections held and action taken thereat shall have the same effect as if held or taken at the annual meeting.

Section 4. *Special Meeting.* Special meetings may be called at any time by the Chairman. Upon receipt of a written request for a special meeting from any six Directors, the Chairman must call a meeting. Written notice of each special meeting, specifying the time and place of the meeting, and the purpose or purposes of the meeting, shall be given to the Directors by the Secretary. Notice shall be deemed sufficient if sent by mail at least seventy-

two hours in advance of the date and time of the meeting or by telegram or otherwise in writing within twenty-four hours before the time of the meeting, if given to the Directors in person. Formal notice to any person shall not be required provided all Directors are present or those not present shall have waived notice in writing, filed with the records of the meeting, either before or after the meeting.

Section 5. *Information.* Information as to the time and place of each meeting shall be furnished to any person who requests such information. Requests to be notified on a continuing basis shall be made at least once a year in writing.

ARTICLE VIII

Quorum

Section 1. *Quorum.* Six Directors shall constitute a quorum for the transaction of all business at a regular or special meeting. A majority of the members of a Committee, not including the *ex officio* member, shall constitute a quorum for the transaction of all Committee business.

Section 2. *Majority Voting.* Action by the Board shall be by a simple majority vote of the Directors present and voting except where otherwise provided by the Bylaws. Seven affirmative votes shall be required to approve bond issues and the annual budget of the Authority.

ARTICLE IX

Trasaction of Business

Section 1. *Regular, Special and Committee Meetings.* Any business of the Agency may be considered at any regular meeting of the Board. Only items of business identified in the agenda distributed by the Secretary forty-eight hours in advance of the meeting may be acted upon at a regular meeting. Other matters may be acted upon

if a majority of the Board of Directors votes to waive this notice provision. When notice of a special meeting is sent, only matters specified or described in the notice may be considered at the special meeting, except that with the unanimous consent of the Directors present any other matter be considered. Business within the jurisdiction of a Committee may be considered at any meeting of the Committee. Only items of business identified in the agenda distributed by the Secretary forty-eight hours in advance of the meeting may be acted upon at a Committee meeting. Other matters may be acted upon if a majority of the Members of the Committee vote to waive this notice provision.

Section 2. *Order of Business.* Unless waived by a vote of six or more Directors, the order of business at a regular meeting of the Board shall be:

a. Approval of the minutes of the previous meeting.

b. Committee Reports

c. Report of Chief Executive Officer and staff.

d. Unfinished business.

e. New business.

f. Other business and adjournment.

Section 3. *Executive Session.* All regular, special and committee meetings of the Board shall be open to the public, except that at any time a majority of the Directors present may affirmatively vote to consider a matter or matters in the categories described below in executive session which will be closed to the public. Any motion to meet in executive session must identify in general terms the subject or subjects to be considered and identify the subsection below under which the executive session is authorized. The following items or matters may be considered and acted upon by the Board, and appropriate officers and staff, in the executive session:

a. Personnel matters such as the discussion or consideration of: employment, appointment, assignment, promotion, demotion, performance appraisal, discipline, resignation, salaries and benefits, and interviews of Directors, officers, and employees of the Authority, and applicants for the same.

b. Personal matters not directly related to the Authority's business in order to protect the privacy of individuals.

c. Existing or prospective contracts, business or legal relationships to protect proprietary or confidential information of the Authority, any person or company; the financial interest of the Authority; or the negotiating position of the Authority.

d. Financial matters, including the indebtedness of the Authority and the investment of Authority funds, particularly where competition or negotiation is involved.

e. Consultation with legal counsel and briefings by staff, consultants and/or attorneys, pertaining to actual or potential litigation, pending or proposed legislation, compliance with a specific constitutional, statutory or judicially imposed requirement, or other legal matters, and discussions of such matters by the Board without the presence of counsel, staff, consultants, or attorneys.

f. Discussion of security plans and other law enforcement measures for the protection of the public from terrorism and aircraft hijacking.

g. Audit matters.

Section 4. *Actions in Executive Session.* No resolution, contract, or motion, adopted, passed or agreed to in an executive session, other than a request to the staff for information, shall become effective unless the Board or Committee, at an appropriate time following such session, reconvenes in public or open session and takes a vote of the Directors on such resolution, contract, or motion and the subject of the resolution, contract, or motion shall be

reasonably identified in the open session. This shall not be construed to require the Board or Committee to divulge information that is proprietary or actions which are not final.

Section 5. *Other Business.* After completion of the agenda, the Chairman, Directors, or the Chief Executive Officer may, for information purposes, place any matter or matters on the agenda or other business which they deem to require the attention of the Board.

Section 6. *Procedure.* Roberts Rules of Order, as amended, shall be the authority for all matters of procedure not otherwise covered by these Bylaws. A point of order as to procedure raised by any Director in the course of a regular, special or committee meeting shall be resolved by a ruling of the Chairman. The vote of a majority of the Directors present shall be required to overrule the Chairman.

ARTICLE X

Directives and Regulations

Section 1. *General.* The Board will adopt, amend and repeal as necessary: 1) internal directives and procedures for operating the Airports, including delegations of authority, and 2) regulations which may have the force and effect of law, pertaining to the use, maintenance and operation of its facilities and governing the conduct of persons and organizations using its facilities.

Section 2. *Regulatory procedure.* Unless the Board determines that an emergency exists by unanimous vote of all Directors present, the Board shall, prior to the adoption of any regulation or alteration, amendment, or modification thereof:

a. Make such regulation or amendment thereof in convenient form available for public inspection in the office of the Authority for at least ten days.

b. Publish a notice in a newspaper or newspapers of general circulation in the District of Columbia, Montgomery County and Prince George's County, Maryland, and in the local political subdivisions of the Commonwealth of Virginia where the Authority facilities are located declaring the Authority's intention to consider adopting such regulation or amendment thereof and informing the public that the Authority will hold a public hearing at which any person may appear and be heard for or against the adoption of such regulation or such alteration, amendment, or modification, on a day and at a time to be specified in the notice, after the expiration of at least ten days from the day of the publication thereof; and

c. Hold the public hearing, or appoint a hearing officer to hold a public hearing, on the day and at a time specified in such notice or any adjournment thereof, and hear persons appearing for or against such regulation or amendment thereof.

d. In accordance with the Metropolitan Washington Airports Act of 1986, adoption by the Board of the regulations of the Federal Aviation Administration which govern the Airports at the time the Airports are transferred to the Authority shall not be subject to this procedure.

Section 3. *Inspection of regulations.* The Authority's regulations shall be available for public inspection in the Authority's principal office.

Section 4. *Force and Effect of Law.* The Authority's regulations relating to:

a. Air operations and motor vehicle traffic, including, but not limited to, motor vehicle speed limits and the location of and payment for public parking;

b. Access to and use of Authority Facilities, including but not limited to solicitation, handbilling, picketing and the conduct of commercial activities; and

c. Aircraft operation and maintenance;

shall have the force and effect of law, as shall any other regulation of the Authority which shall contain a determination by the Board that it is necessary to accord the same force and effect of law in the public interest; provided, however, that with respect to motor vehicle traffic rules and regulations, the Board will obtain the approval of the traffic engineer or comparable official of the local political subdivision in which such rules or regulations are to be enforced.

Section 5. *Effective Dates.* The Board shall establish the effective date of its regulatory actions consistent with Article IV of these Bylaws.

ARTICLE XI

Miscellaneous

Section 1. *Code of Ethics.* The Board shall adopt a code of ethics and financial disclosure to assure the integrity of all decisions by the Board, its Board of Review, and employees of the Authority. The code shall provide that each Director and his/her immediate families may not hold a substantial financial interest in any enterprise that has or is seeking a contract or agreement with the Airports Authority or is an aeronautical, aviation services, or airports services enterprise that otherwise has interests that can be directly affected by the Airports Authority. Exceptions may be made if the financial interest is fully interest is fully disclosed to the Board and the Director does not participate in Board decisions that directly affect such interest.

Section 2. *Indemnity.* The Authority shall indemnify each Director and Officer against all costs and expenses (including counsel fees) the Director actually incurs in connection with or resulting from any action, suit or proceeding, of whatever nature, to which the Director is or shall be made a party by reason of his being or having

been a Director or Officer of the Authority, provided (1) that the Director or Officer conducted him- or herself in good faith and (2) reasonably believed that his or her conduct was in the best interest of the Authority. This indemnity shall not apply in actions when the Director or Officer is adjudged liable to the Authority.

Section 3. *Minority participation.* The Board shall develop and adopt a policy for providing minority participation in the contracts of the Authority.

ARTICLE XII

Amendments

These Bylaws may be amended or repealed in whole or in part by resolution of the Board adopted by at least seven Directors at any regular meeting or special meeting, provided that notice of intention to present such resolution shall be given to all Directors at least two days in advance of the meeting at which the motion to adopt such resolution is to be made. Such notice shall be given by any Director, or by the Secretary at the request of any Directors, and shall specify the subject matter of the proposed amendment or repeal. The notice of intention to amend or repeal these Bylaws shall include a specific reference to the Article subject to the proposed amendment or repeal, together with the suggested change.

Adopted March 4, 1987

Amended January 8, 1992 and April 1, 1992

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-556-JHG

JOHN W. HECHINGER, SR., *et al.*,
Plaintiffs,

v.

METROPOLITAN WASHINGTON
AIRPORTS AUTHORITY, *et al.*,
Defendants.

PLAINTIFFS' STATEMENT OF MATERIAL FACTS

Pursuant to Local Rule 108(h), plaintiffs submit the following statement of material facts as to which there is no genuine issue.

1. On February 5, 1992, after receiving a list of five nominees from the Speaker of the House, which consisted entirely of Members of the House of Representatives, four of whom serve on the House Committees with oversight responsibility over transportation matters, the Board of Directors appointed those five Members to the Board of Review. Answer ¶ 24; Board of Directors Meeting, Minutes of Feb. 5, 1992, at 8 (Pl. Ex. B). The Board of Directors did not request the submission of any additional names from the House. All five of the House nominees were members of the old Board of Review at the time of the Supreme Court decision. *Compare* Pl. Ex. B *with* 1991 Hearing at 6.

2. In February, 1992, the Board of Directors received a list of three nominees from the President *pro tempore* of the Senate, which consisted of three Senators who serve on the Senate Committees with oversight responsi-

bility over transportation matters, and who had been members of the Board of Review in June 1991, and a letter submitting the name of one individual who is not a Member of Congress. Letters to Hon. Linwood Holton from President *pro tempore* Robert Byrd (Feb. 5, 1992 & Feb. 20, 1992) (Pl. Exs. C & D); *cf.* 1991 Hearing at 6. The Board of Directors did not request the submission of any additional names from the Senate. On February 27, 1992, the Board of Directors appointed these four individuals to the Board of Review. Answer ¶ 25; Board of Directors Special Meeting, Minutes of Feb. 27, 1992, at 1 (Pl. Ex. E).

3. The 60-day review period set forth in the Metropolitan Washington Airports Authority Amendments, § 6007(f)(4)(D), will span at least three months, and might span more than six months in some circumstances. Affidavit of Pamela Gilbert ¶¶ 3-4 (May 28, 1992).

Respectfully submitted,

/s/ Patti A. Goldman
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May 29, 1992

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-556-JHG

JOHN W. HECHINGER, SR., *et al.*,
Plaintiffs,

v.

METROPOLITAN WASHINGTON
AIRPORTS AUTHORITY, *et al.*,
Defendants.

AFFIDAVIT OF PAMELA GILBERT

I, Pamela Gilbert, hereby declare as follows:

1. I am the legislative director of Public Citizen's Congress Watch, a position that I have held since the end of 1989. In that capacity, I supervise a staff of four attorneys who regularly lobby Congress on a wide range of issues, as well as handling my own lobbying duties. From 1984 until I came to Public Citizen, I was the consumer program director of the U.S. Public Interest Research Group, the national lobbying office for a network of state consumer advocacy organizations. In that capacity, I engaged in extensive lobbying of the U.S. Congress. Based on my lobbying experience, I am familiar with congressional practices, including the patterns of congressional recesses and adjournments.

2. I understand that, in the Metropolitan Washington Airports Act Amendments of 1991, Congress established a 60-day period for Congress to review certain actions of the Metropolitan Washington Airports Authority ("MWAA"), and that the review period consists of calendar days excluding Saturdays, Sundays, holidays,

and any day on which neither House of Congress is in session because of an adjournment *sine die*, a recess of more than three days, or an adjournment of more than three days.

3. Since this period excludes weekends and holidays, it consists of at least three months. However, based on my experience, Congress typically recesses or adjourns for more than three days at least once during any three month period, and such recesses or adjournments can occur much more often than that. Therefore, on average, the review period will span more than three months.

4. However, it is also possible for the review period to cover more than six months, particularly in an election year when Congress generally recesses for two long breaks in the summer for party conventions, and then adjourns *sine die* in early October. Thus, if the MWAA Board of Directors submitted an action to Congress in late June of this year, there would be only approximately 15 to 20 legislative days in July, less than 10 legislative days in August, and 15 to 20 legislative days in September before Congress adjourns *sine die*. The new Congress would not begin until the third week in January, 1993. Therefore, it is possible for the 60 day review period to span more than six months.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 28 day of May, 1992.

/s/ Pamela Gilbert
PAMELA GILBERT

Supreme Court, U.S.
FILED
DEC 22 1994
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DEC 22 1994
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 94-925

In the

Supreme Court of the United States

October Term, 1994

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, *et al.*,

Petitioners,

v.

JOHN W. HECHINGER, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS JOHN W. HECHINGER *et al.*

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Were the lower courts correct in holding that the minor changes made by Congress, following this Court's prior decision striking down the Congressional Board of Review created to control the major decisions of the Metropolitan Washington Airports Authority, did not cure the separation of powers infirmities in the statutory scheme?

2. Even if the revised statute satisfies the requirements of separation of powers, is it nonetheless invalid because the members of the Board of Review exercise power under a federal statute and they are selected in a manner admittedly not in conformance with the Appointments Clause of the Constitution?

PARTIES TO THE PROCEEDINGS

The respondent Citizens for the Abatement of Aircraft Noise, Inc., is a non-profit corporation that has no parents or subsidiaries.

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No. 94-925

In the

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METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, *et al.*,

Petitioners,

v.

JOHN W. HECHINGER, *et al.*,

Respondents.

BRIEF IN OPPOSITION FOR RESPONDENTS JOHN W. HECHINGER *et al.*

OPINIONS BELOW

The opinion of the court of appeals is now reported at 36 F.3d 97.

STATEMENT OF THE CASE

This case is the second in a continuing saga of congressional meddling in the operation of the Washington Metropolitan Airports. In respondents' prior challenge, this Court held that Congress cannot give a few of its Members veto power over the core functions of the petitioner Metropolitan Washington Airports Authority ("Airports Authority" or "MWAA"). After that decision, Congress tinkered at the margins with the structure of the Board of Review, but it continued to give its own agents substantial

supervisory control over crucial decisions involving the two airports. Both lower courts unanimously held that, because the superficially modified Board of Review still ensures that congressional agents will continue to have the power to shape the core actions of the Airports Authority, the Board of Review violates the separation of powers doctrine. In addition, the district court also ruled that, because the Board of Review exercises substantial federal authority, its members must be appointed in accordance with the Appointments Clause in Art. II, § 2, cl. 2, which they are not. Because both of these rationales would sustain the decision below, and because, as we now show, Congress did not make a serious attempt to comply with this Court's prior ruling, the Petition should be denied.

The Original Board of Review

In contrast to all other commercial airports in the United States, which are operated by state, local, or regional authorities, Washington National and Dulles International Airports were owned and operated by the federal government prior to 1987. In 1984, a Department of Transportation advisory commission recommended that the two airports be leased to a regional authority, to be established by an interstate compact between the Commonwealth of Virginia and the District of Columbia, and governed by a body whose members would be appointed by the Governors of Virginia and Maryland, the Mayor of the District of Columbia, and the President of the United States. Advisory Commission on Reorganization of the Metropolitan Washington Airports, Report to Secretary at 1, 3-6 (1984). The commission's report contained no recommendations for retained congressional or federal oversight, other than through the terms of the lease for the two airports and the presidential appointee on the governing body. *Id.*

Over the next two years, legislation implementing the advisory commission's recommendations was passed by the

U.S. Senate, the Virginia Assembly, and the D.C. Council, and was approved by the Subcommittee on Aviation of the House Committee on Public Works and Transportation. *See* 132 Cong. Rec. 7276 (1986); 1985 Va. Acts ch. 598; D.C. Law. 6-67 (1985); 132 Cong. Rec. 32135 (1986). During the congressional consideration of that legislation, there was complete agreement that federal funds had historically been inadequate to deal with the airports' problems and that some congressional action was sorely needed to create an infusion of capital. Senate Comm. on Commerce, Science, & Transportation, Metropolitan Washington Airports Transfer Act of 1985, S. Rep. No. 193, 99th Cong., 1st Sess. 2 (1985) ("Senate Report"). For Congress, the vexing issue was how to devise a financial solution and at the same time retain federal control.

Although many Members of Congress, led by Senators and Representatives who have since served on the Board of Review, objected to relinquishing federal control over the airports, the bills passed by the Senate and approved by the House Aviation Subcommittee contained no provisions for a congressional role in the ongoing operation of the airports. However, those bills were subsequently amended to add a Board of Review, comprised of nine Members of Congress, invested with the power to veto major actions of the Airports Authority, such as the adoption of an annual budget, the issuance of bonds, the promulgation of regulations, and the adoption of development and land acquisition plans. 132 Cong. Rec. 28521-25 (1986); Metropolitan Washington Airports Act of 1986, Pub. L. No. 99-591, §§ 6002-6012, 100 Stat. 3341 (1986) ("Airports Act"). As a precaution against Congress losing control over the Airports Authority as a result of an adverse ruling on the constitutionality of the Board of Review, a "drop-dead" clause was added, which provided that the Airports Authority would itself lose the power to perform any of the actions that were subject to the Board of Review's veto if a court declared the veto power unconstitutional. *See* 132 Cong. Rec. 32133 (1986).

In the House floor debate, which constitutes the only recorded congressional discussion of the original Board of Review provisions, numerous Members, led by those who have since served on the Board of Review, stressed the importance of the Board of Review as a mechanism for retaining congressional control over the airports.[1] Perhaps the most frank assessment came from Representative Smith, who stated:

> Under this plan, Congress retains enough control of the airports to deal with any unseen pitfalls resulting from this transfer of authority.... We are getting our cake and eating it too.... The beauty of the deal is that Congress retains its control without spending a dime.

Id. at 32137.

As originally enacted, the Airports Act called for the establishment of a nine-member Board of Review that "shall consist of" Members of Congress with certain specified committee affiliations. 49 U.S.C. App. § 2456(f)(1). While the Airports Act proclaimed that members of the Board of Review would serve "in their individual capacities, as representatives of the users of the Metropolitan Washington

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[1]*See, e.g.*, 132 Cong. Rec. 32136 (1986) (statement of Rep. Coughlin, a present Board of Review member) (the bill "provides for continued congressional control over both airports"); *id.* at 32142 (statement of Rep. Conte, a former Board of Review member) (transfer would "not give up congressional control and oversight — that remains in a Congressional Board of Review"); *id.* at 32143 (statement of Rep. Hammerschmidt, a present Board of Review member) ("[w]e will have more control [through the veto power] than before. ... At present, pressure on FAA seems to be our only way to influence events at the two airports"); *id.* at 32135 (statement of Rep. Lehman, a present Board of Review member) (the "Congressional Board" would provide "for continuing congressional review over the major decisions of the new airport authority").

Airports," *id.*, they all had to be Members of Congress, and they could not be from Maryland, Virginia, or the District of Columbia. *Id.* Moreover, the Airports Authority was limited in its selection to a list of names submitted by the Speaker of the House and the President *pro tempore* of the Senate, who were not required to submit, and, in practice, did not submit, more names than the number of vacant slots. *Id.*

The original Board of Review had the power to veto the Airports Authority's core actions. 49 U.S.C. App. § 2456(f)(1) & (4). Thus, the Airports Authority could not authorize the issuance of bonds, appoint a chief executive officer, adopt an annual budget, approve development or land acquisition plans, or change its regulations, without first submitting its proposed action to the Board of Review for consideration and an opportunity to veto the decision. *Id.* § 2456(f)(4).

This Court's Ruling

Respondents John W. Hechinger and Craig Baab, who live under National Airport's flight path, and respondent Citizens for the Abatement of Aircraft Noise, Inc., a nonprofit membership organization of individuals and citizen groups who wish to minimize adverse noise, safety, and environmental effects of air traffic at National Airport, brought an action challenging the constitutionality of the original Board of Review, and this Court held that the Board of Review was unconstitutional. *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 111 S. Ct. 2298 (1991) ("*CAAN*").

The premise of that decision was the Court's conclusion that the Board of Review exercised sufficient federal power to be subject to the federal constitutional doctrine of separation of powers because it is "[1] an entity created at the initiative of Congress, [2] the powers of which Congress

has delineated, [3] the purpose of which is to protect an acknowledged federal interest, and [4] membership in which is restricted to congressional officials." *CAAN*, 111 S. Ct. at 2308 (numbering added). Moreover, Congress had conditioned the transfer of the airports on the establishment of the Board of Review, and it had provided that the Board's invalidation would prevent the Airports Authority from taking any action that would have been subject to the Board of Review's oversight. *Id.* at 2307. Elaborating, the Court was persuaded that the Board was an agent of Congress, rather than purely a state entity, because Congress exercised significant control over the composition of the Board of Review through the requirements that the Members had to be selected from lists submitted by the congressional leadership, which did not need to include more names than the available slots, and eight of the nine members had to come from the relevant congressional committees, which gave Congress control over any particular Member's eligibility to serve on the Board of Review. *Id.* at 2307-08. The recitation in the Airports Act that Members of Congress serve on the Board of Review "in their individual capacities, as representatives of users" of the airports, did not, in the Court's view, eliminate these many vestiges of congressional control. *Id.* at 2307.

The Court then held that, as a congressional agent, the Board of Review could not constitutionally exercise its veto authority. Without deciding whether the Board of Review's powers were properly characterized as executive or legislative, the Court concluded that "[i]f the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7." *Id.* at 2312. On that basis, the Court ruled that "the Board of Review is an impermissible encroachment" on the Executive Branch, without deciding whether it also violated the Incompatibility, Ineligibility, and Appointments Clauses. *Id.* at 2312 & n.23.

The New Board of Review

In September 1991, the Subcommittee on Aviation of the House Committee on Public Works and Transportation held a hearing on amending the Airports Act. *Amendments to the Metropolitan Washington Airports Authority Act of 1986*, 102d Cong., 1st Sess. (1991) ("*1991 Hearing*"). At the hearing, Members of Congress from outside the Washington metropolitan area generally expressed a desire to retain congressional control over the airports. As one Representative described the task before Congress, "[a] solution must be found that will provide a constitutional mechanism for congressional participation in the authority's decision-making process." *1991 Hearing* at 36 (statement of Rep. Payne); *accord id.* at 19, 34-35 (statement of Rep. Mineta, a current and past Board of Review member); *id.* at 39 (statement of Rep. Poshard).[2]

At that time, the only bill that had been introduced contained a straightforward "report and wait" provision, which would have required the Airports Authority to submit certain of its actions to Congress for a specified period of time before they could go into effect. *1991 Hearing* at 8; H.R. 2718, 102d Cong., 1st Sess (1991). However, the Subcommittee also considered keeping the Board of Review intact, but removing some aspects of congressional control, or, alternatively, making the Board's role advisory only. *1991 Hearing* at 7-8.

Petitioners have claimed that, during these hearings, Congress "considered the views of local residents and nationwide users of the Washington Airports as well as the

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[2]In a candid statement about Congress' goal in recreating a Board of Review, Subcommittee Chair Oberstar observed that "[i]n the final analysis, they [the Supreme Court Justices] park out there, too. And they know what we are up to." *1991 Hearing* at 144.

views of constitutional law experts." Petition at 7. However, the Aviation Subcommittee did not invite respondents' attorneys or any neutral constitutional lawyers or law professors to testify. Instead, the Subcommittee invited only two witnesses — an attorney with the Congressional Research Service and a nonlawyer, political scientist — to discuss the constitutionality of possible modifications of the Board of Review in light of this Court's 1991 decision.

Even then, both witnesses concluded that Congress either had to eliminate all vestiges of congressional authority to appoint or remove the Board of Review members, or had to make the Board of Review's powers purely advisory. *See 1991 Hearing* at 202, 204, 208 (testimony of Johnny H. Killian, Congressional Research Service, & Jessica Korn). To eliminate congressional control, the witnesses recommended that there be no requirement that the Board of Review consist of Members of Congress, that the lists submitted by the congressional leadership be advisory only, and that Congress eliminate the drop-dead clause. *Id.* at 140, 209, 210 (Korn); *id.* at 202 (Killian).

Although some of the statutory revisions under consideration would have satisfied these principles, Congress ultimately did not heed this advice. The final bill neither removed all vestiges of congressional control, nor made the Board of Review's powers purely advisory. Instead, the final bill sought to accomplish the goal of the earlier law, while making only a few cosmetic changes, in the hope that they would insulate the new Board of Review from constitutional challenge. *See* Metropolitan Washington Airports Authority Amendments of 1991, Pub. L. No. 102-240, Title VII, 105 Stat. 2197 ("1991 Amendments").

The principal cosmetic change in the composition of the Board of Review is that the statute no longer expressly requires that its members be Members of Congress. Rather, the 1991 Amendments establish a series of membership

requirements that essentially serve as surrogates for a congressional membership requirement. In particular, the members of the Board of Review must: (1) "have experience in aviation matters and in addressing the needs of airport users"; (2) be frequent users of the Metropolitan Washington Airports; and (3) be registered voters in a jurisdiction other than Maryland, Virginia, or the District of Columbia. 49 U.S.C. App. § 2456(f)(2)(C). Members of Congress from districts outside the D.C. metropolitan area, especially those who serve on the airports oversight committees — *i.e.*, the Members who made up the old Board of Review — obviously will have no trouble meeting these requirements.

To ensure that such Members sit on the Board of Review, Congress retained the requirement that the nine members of the Board of Review must be selected by the MWAA Board of Directors from lists submitted by the Speaker of the House and the President Pro Tempore of the Senate. *Id.* § 2456(a)(1). Those lists are *not* advisory, as recommended by the two witnesses at the Aviation Subcommittee hearing. Moreover, the lists need not contain more names than the number of available slots. However, in an attempt to appear responsive to this Court's concerns, the 1991 Amendments provide that the Airports Authority may request that the congressional leadership submit additional names, and members of the Board of Review are now subject to removal for cause by a two-thirds vote of the Board of Directors. *Id.* §§ 2456(a)(1), (f)(1). Of course, as in the past, any replacements must come through the congressional nominations process.

Under the Amendments, certain specified actions of the Airports Authority must still be submitted to the Board of Review at least 30 (or, in the case of an annual budget, at least 60) days before they are to become effective. Like the original Airports Act, these actions include (1) the adoption of an annual budget; (2) an authorization to issue bonds and an annual plan for their issuance; (3) the adoption,

amendment, or repeal of a regulation; (4) the adoption or revision of a master plan; (5) the appointment of the chief executive officer; and (6) the approval of land acquisitions. *Id.* § 2456(f)(4). Not only did the 1991 Amendments not reduce these areas of Board of Review intervention, but it actually expanded item (6) to include long-term easements and land disposals, and added (7) the award of a contract (other than for bond issuances) and (8) the approval or modification of a terminal design or layout. *Id.* § 2456(f)(4)(A) and (B).

Under these Amendments, within the longer of 30 calendar days or ten legislative days of the submission to the Board of Review of these proposed actions, the Board may make "recommendations" to the MWAA Board of Directors regarding such actions, including a recommendation that an action not go into effect. *Id.* § 2456(f)(4)(C). If the Board of Review recommends that an action be modified, and the Board of Directors adopts that recommendation, then the action may go into effect as modified. *Id.* § 2456(f)(4)(D)(i). Similarly, the proposed action may take effect if the Board of Review does not make a recommendation within the specified time period. *Id.* § 2456(f)(4)(C).

On the other hand, if the Board of Review recommends that a particular action be modified or rejected, and the Board of Directors does not agree, then the proposed action may not go into effect at that time. Instead, the Board of Directors must transmit its proposed action, the Board of Review's recommendation, and its written evaluation and response to that recommendation to Congress for a 60-legislative-day review period. If, at the end of the 60 legislative days, Congress has not passed a joint congressional resolution of disapproval, then and only then may the action go into effect in the form in which it was originally proposed. *Id.* § 2456(f)(4)(D) & (5). In counting legislative days, the 1991 Amendments exclude Saturdays, Sundays, holidays, and any day on which neither House of

Congress is in session because of an adjournment *sine die*, or a recess or adjournment of more than three days. *Id.* § 2456(f)(4)(D)(ii). As a practical matter, this 60-day review period will almost always exceed three months, and could span even more than six months. Affidavit of Pamela Gilbert, ¶¶ 3-4 (Pet. App. 219a-220a). During that time, the proposed action remains in limbo.

As a result, the Board of Review has the power to delay an action for several months beyond the delays already inherent in the review process. That is the stick that the new Board of Review holds. In the case of the budget, this delay could freeze many operations of the Airports Authority, because the Authority may not obligate or expend any money in a fiscal year for which a budget has not gone into effect, except for debt service on previously authorized obligations, obligations and expenditures for previously authorized capital expenditures, and routine operating expenses. 49 U.S.C. App. § 2456(f)(4)(E).

The Board of Review may also ask the Airports Authority to consider, vote, or report on any matter "related to" either National or Dulles Airport, and the Airports Authority has a statutory obligation to comply with any such request "as promptly as feasible." *Id.* § 2456(f)(6). Members of the Board of Review may also participate as nonvoting members at all meetings of the Airports Authority's Board of Directors, *id.* § 2456(f)(7), and the Board of Review has paid staff located at MWAA's headquarters to monitor MWAA activities. Through these powers, especially when they are coupled with the threat of extensive delays under its review authority, the Board of Review has the power to initiate and shape actions of the Airports Authority, as well as to react to, and at least halt temporarily, proposed actions submitted to it.

Finally, the Amendments retain the drop-dead clause that this Court deemed to be a further indication of Congress' desire to retain control over the airports, *CAAN*, 111 S. Ct.

at 2307, and that one of the witnesses insisted be eliminated to save the Board of Review. *1991 Hearing* at 210. Thus, as with the prior Board of Review, if the new Board is unable to carry out its functions by reason of a judicial order, the Airports Authority thereafter shall have no authority to perform any of the expanded list of actions that are subject to Board of Review scrutiny. 49 U.S.C. App. § 2456(h).[3]

Congress never held a hearing to address the constitutionality of the Board of Review scheme contained in the final 1991 Amendments. Instead, the only input that it obtained came from an attorney employed by the Congressional Research Service, who, not surprisingly, concluded that the 1991 Amendments met the constitutional objections of the Court in *CAAN*. 137 Cong. Rec. H10,349 (daily ed. Nov. 18, 1991). The Executive Branch disagreed, taking the position as set forth in President Bush's signing statement that the Board of Review "would not cure the defects found by the Supreme Court [and] would violate the Appointments Clause of the Constitution." Signing Statement (Dec. 18, 1991).

In February 1992, the Speaker of the House submitted a list of five nominees, which consisted entirely of Members of the House of Representatives, four of whom were then

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[3]As a further indication of Congress' intent to continue to control operational decisions of the Airports Authority, the conference report admonished the Authority to minimize walking distances between terminals and between terminals and parking facilities, to have a permanent system of moving sidewalks to transport people between the various terminals and parking facilities, and to afford its employees wages and benefits equivalent to what they received when they were employed by the federal government. H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 474-75 (1991). Moreover, the conference report stated that the Airports Authority should report to the Board of Review on these matters and that Congress would continue to monitor MWAA's progress. *Id.* at 475.

serving on the House Committees with oversight responsibility over transportation matters, and all of whom had been members of the old Board of Review at the time of this Court's decision. Plaintiffs' Statement of Material Facts ¶ 1 (Pet. App. 217a). Shortly thereafter, the President *pro tempore* of the Senate submitted the names of three Senators who were serving on the Senate Committees with oversight responsibility over transportation matters, and who had been members of the Board of Review in June 1991, and the name of one individual who is not a Member of Congress. *Id.* ¶ 2 (217a-218a). Not surprisingly, the MWAA Board of Directors chose all of the individuals who were nominated by the congressional leadership to the Board of Review. *Id.* In other words, the new Board of Review was identical in composition to the old Board, except for the addition of one individual who is a not a Member of Congress.[4]

The Decisions Below

Respondents filed this action challenging the new Board of Review on separation of powers, Appointments Clause, and Ineligibility and Incompatibility Clause grounds. In a memorandum opinion and order issued on January 31, 1994, United States District Judge Joyce Hens Green, who had upheld the Board of Review in the first case, ruled that the

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[4]That individual is Drew Lewis, formerly Secretary of Transportation, and currently president and chief executive officer of Union Pacific Railroad. Since the appointment of the Board of Review, one Senator submitted his resignation from the Board of Review, not to the MWAA Board of Directors, but to the majority leader of the Senate. He was then replaced by another Senator. Three of the congressional Board of Review members — former Representatives Hammerschmidt, Lehman, and Coughlin — were not reelected to Congress, but continue to serve on the Board of Review.

1991 Amendments failed to cure the constitutional defects in the Board of Review scheme. Pet. App. 33a-34a.

First, the court concluded that the 1991 Amendments' "criteria and conditions create an entity that is unquestionably an agent of Congress." Pet. App. 29a. More specifically, Congress ensured that "many members of Congress – and few others — will be eligible to serve on the Board of Review ..., and more fundamentally, either the Speaker or the President *pro tempore* must select every member of the Board of Review." Pet. App 29a-30a. Not only did Congress retain "extraordinary control over the composition of the Board of Review," but it also created the Board of Review and delineated its powers to protect an acknowledged federal interest. Pet. App. 30a.

Second, the district court found that the Board of Review "exercise[s] significant control over the Airports Authority and management over its core aspects of operation ...." *Id.* After noting that the new Board of Review has the power to influence even more actions than its predecessor, Pet. App. 31a, the court concluded that, under the new scheme, "the Airports Authority must either bow to the will of the Board of Review, or risk the time and uncertainty of congressional action" for as long as six months. Pet. App. 32a. In the court's view,

> This power is far more than merely "advisory" as defendants claim; it gives the Board of Review the power to coerce the Airports Authority to comply with any "recommendation." The Constitution does not permit this agent of Congress to play such an influential role in controlling the actions of the Airports Authority. *Id.*

Third, having concluded that the Board of Review exercises significant federal power over the Airports Authority, the district court held that its members constitutionally must be, but were not, appointed in

accordance with the Appointments Clause. Pet. App. 32a-33a. In reaching this conclusion, the district court rejected the Airports Authority's claim that the Board of Review is a nonfederal, interstate agency not subject to the Appointments Clause as "clearly ... without merit" in light of this Court's decision that the original Board of Review is subject to separation of powers principles. Pet. App. 33a, *citing CAAN*, 111 S. Ct. at 2306-07. Accordingly, the court declared that the Board of Review is unconstitutional and that its future actions are invalid. Pet. App. 34a.

Because of the importance of the Board of Review's authority to MWAA's operations and the effect of the drop-dead clause, the Airports Authority and the Board of Review thereafter asked the district court to stay the effective date of its order, which the court did for a period of 75 days, Pet. App. 35a-38a, which the court of appeals subsequently extended. Pet. App. 39a. In support of the motion in the district court, the Airports Authority submitted an affidavit of its general manager, James Wilding, contending that the Airports Authority would suffer irreparable harm from its inability to undertake many of the actions subject to the Board of Review's powers. Thus, the affidavit asserted that even a hiatus of a few months would jeopardize contracts for airport food service, installation of a runway lighting system, institution of a taxi permitting system at National Airport, and development of a telecommunications system. Wilding Affidavit ¶¶ 4-9 (February 14, 1994), *cited at* Pet. App. 15a.

The case was briefed and argued on an expedited basis, and the court of appeals, in a unanimous opinion by Circuit Judge Buckley, joined by Circuit Judges Williams and Rogers, affirmed on separation of powers grounds, without reaching the Appointments Clause issue. Pet. App. 19a. It began its analysis by examining whether the new Board of Review continued to be an agent of Congress. It specifically found that "[n]o single factor is dispositive," Pet. App. 6a, and that elimination of the requirement of congressional membership "does not end our inquiry." Pet. App. 7a.

The court then followed the functional approach specifically mandated by this Court's prior decision in *CAAN*, examining both the new rules for membership and the reality of who had become and is likely to become a member in the future. Pet. App. 8a-9a. The court was "struck by Congress's choice of the period within which the Board [of Review] must make its recommendations: the longer of 30 calendar days or 10 legislative days," finding "no reason for such a provision other than to serve the convenience of the Members of Congress who were expected to serve on the Board." Pet App. 9a. Finally, the court of appeals reviewed the new qualifications for membership and the fact that the Airports Authority is permitted to select nominees only from the lists provided by the two Houses of Congress. *Id.* It therefore concluded that "Congress retains control over appointments" to the Board, and "Congress intended the Board to serve, and we hold that it does serve, as its agent." Pet. App. 10a.

Next the court analyzed the issue of whether the Board of Review exercises federal power and, based upon a review of all its powers and their source in federal law, concluded that it did. The Board's principal contention there, as here, was that its function was purely advisory and that the statute operated like traditional report and wait provisions. But the court of appeals rejected that analogy, finding that action by the Board of Review alone could determine "whether action taken by the Directors will be allowed to take immediate effect or be subjected to a 60-statutory-day congressional review," and concluding that it is "this discretion that provides the Board its leverage." Pet. App. 12a.

The Board also sought to rely on the decisions in *Ameron, Inc. v. United States Army Corps of Eng'rs*, 809 F.2d 979 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1988), and *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102 (9th Cir. 1988), *irrelevant portion withdrawn en banc*, 893 F.2d 205 (9th Cir. 1989), both of which arose under the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-

3556 (1988). However, the court of appeals recognized that those decisions were distinguishable because the Airports Act "does not allow the Authority to override the Board, a safeguard that both *Lear* and *Ameron* viewed as vital in concluding that the stay provisions" were constitutional. Pet. App. 14a-15a. It found that the inability to override "is a serious hindrance to the Authority" and that the "pressure to avoid such costly interruptions by accommodating the Board is self-evident." Pet. App. 15a. The court then rejected the Board's attempt to equate its ability to stop major decisions of the Authority for periods of up to six months with other means of congressional influence, finding "a qualitative difference" between the two: " — the difference between persuasion and coercion." Pet. App. 16a. Accordingly, the court upheld the decision of the district court on separation of powers grounds, but ordered that the previous actions taken by the Board not be invalidated. Pet. App. 19a.

REASONS FOR DENYING THE WRIT

1. The principal reason why review should be denied is that the decision below is so plainly correct as not to warrant further consideration by this Court. The 1991 Amendments made a series of cosmetic changes to the Airports Act that responded only superficially to the separation of powers problems that plagued the original Board of Review. The result is a less blatant, but nonetheless still unconstitutional meddling by Congress in the affairs of the local airports.

Ultimately, Congress still insisted on aggrandizing itself, by giving its agents impermissible control over major decisions affecting the airports. It gave the congressional leadership the power to pre-select the Board of Review, and it laid out criteria that ensured that Members of Congress would be among the few who would qualify to serve on the Board of Review. It also kept the drop-dead clause to ensure that the Airports Authority would be powerless to run the

airports if Congress were precluded from overseeing its actions. As a result, the renewed Board of Review, like its predecessor, is a congressional agent, which may not, under the Constitution, exercise retained federal power to control the actions of the Airports Authority.

In contravention of the doctrine of separation of powers, Congress has delegated to this congressional agent the federal power to coerce the Airports Authority into acting in accordance with the Board of Review's wishes. That power is far more than "mere advice or influence," as the petitioners suggest (Pet. at 21). Instead, as the court of appeals recognized, the "mere existence of this power to delay provides the Directors with an enormous incentive to avoid confrontations by tailoring their decisions to suit the Board's pleasure; it also gives the Board the power to hold an important decision hostage in order to secure the Directors' agreement to an unrelated matter." Pet. App. 18a.

Ordinarily, when an Act of Congress is struck down, this Court will review the lower court decision. Thus, when the original challenge to the Board of Review was before this Court after the D.C. Circuit held that it violated separation of powers, respondents did not oppose *certiorari*, and the Court accepted the case, then ruling against the Board on the merits. In this situation, there is not only a prior decision of this Court for petitioners to surmount, but a legislative history of the 1991 Amendments, described at pages 7-13 of this Opposition, that evidences only the most minimal attempt to comply with the letter of this Court's prior ruling, and no attempt at all to deal with the underlying rationale of the decision: to prevent undue congressional interference with the operation of Dulles and National Airports by means short of enacting legislation. Under these circumstances, where there is substantial doubt, based on the words and deeds of those who supported the 1991 Amendments, whether Congress made a good faith attempt to meet this Court's objections, there is no reason for this Court to review the

court of appeals' decision striking down those Amendments on separation of powers grounds.

2. The Petition argues (pp 14-21) that review is warranted because there is a conflict between the decision below and (1) decisions of this Court upholding report and wait provisions, and (2) the decisions of the Ninth and Third Circuits in *Lear* and *Ameron*, which upheld a statute allowing the Comptroller General to review certain contracting decisions, including the power to extend the time for completing such review. Assuming that those latter decisions survive this Court's subsequent ruling in *Bowsher v. Synar*, 478 U.S. 714 (1986), an issue that became moot when Congress changed the applicable statute after this Court had agreed to review the lower court's ruling in *Ameron*, the court of appeals correctly distinguished those decisions because the statute at issue in them contained an express authorization for the agency to override the delay when necessary for operational reasons, but no such authority is granted under the Airports Act. Pet. App. 13a-15a.

Petitioners' attempt to utilize the authorities upholding report and wait provisions is equally unavailing. In those statutes, the review is automatic, and the time allowed for review cannot be shortened or lengthened by any action of any body of Congress. Under those provisions, only a statute can prevent the reported action from becoming law, and only a statute can effect a delay of even a day in the effective date of any such action. By contrast, under the 1991 Amendments, there is no automatic report and wait; instead, Congress never receives a report, and there is no congressional waiting period, unless the Board of Review affirmatively decides that there shall be one. To be sure, the "wait" can be avoided if the Directors of the Airports Authority accept the Review Board's "recommendations," either before or after the proposed action is formally transmitted to them, a circumstance that is wholly lacking in any other report and wait provision that this Court has approved.

3. Even if petitioners could avoid the pitfalls of the separation of powers doctrine, the Board of Review could still not exercise its assigned powers for another reason. The powers of the Board of Review are derived solely from the Airports Act, including the 1991 Amendments. As a result, it exercises significant delegated federal authority, which, under *Buckley v. Valeo*, 424 U.S. 1, 121, 140-41 (1976), means that its members are officers of the United States who must be appointed in accordance with the Appointments Clause, which petitioners concede did not happen here. The Appointments Clause ensures that the Executive Branch, rather than Congress, appoints and supervises those individuals who perform significant federal executive functions, and it applies even if the Board of Review is not a congressional agent. Neither Congress nor an interstate compact agency may appoint officers of the United States. Accordingly, because the Board of Review was appointed in violation of the Appointments Clause, the judgment below would have to be affirmed on that basis as well.[5]

* * * * *

Congress has had two chances to create a Board of Review that meets the requirements of the Constitution. This Court struck down its first attempt, and all four judges who have considered the 1991 attempt have found it seriously wanting. The Constitution is clear that, despite Congress' wish of "getting our cake and eating it too," (*supra* at 4), if Congress wishes to retain control over National and Dulles Airports, it may continue to do so, but only by passing laws in the manner prescribed by the Constitution. The time has come to conclude this attempted end-run on the Constitution

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[5] As a corollary, the Incompatibility Clause, Art. I, § 6, cl. 1, bars Members of Congress from holding any non-congressional office under the laws of the United States. Thus, service on the Board of Review by present Members of Congress violates this provision as well as the Appointments Clause.

by denying the Petition. Then, under the stay which continues in effect until March 31, 1995 (assuming the Court acts on the Petition in January), Congress can promptly create a constitutional Board, with advisory functions only, or dispense with the whole idea entirely.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1994

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, ET AL., PETITIONERS

v.

JOHN W. HECHINGER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether 49 U.S.C. App. 2456(f) (Supp. IV 1992), which provides for a Board of Review that consists of members proposed by the Speaker of the House of Representatives and the President *pro tempore* of the Senate and that has power to oversee and postpone actions of the Metropolitan Washington Airports Authority, violates the separation of powers doctrine and this Court's decision in *Metropolitan Washington Airports Authority* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991).

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-925

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, ET AL., PETITIONERS

v.

JOHN W. HECHINGER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 36 F.3d 97. The opinion of the district court (Pet. App. 22a-38a) is reported at 845 F. Supp. 902.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1994. The petition for a writ of certiorari was filed on November 22, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves the Metropolitan Washington Airports Act of 1986 (Transfer Act), 49 U.S.C. App. 2451 *et seq.*, as amended. In *Metropolitan Washington Airports Authority* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) (*CAAN*), this Court held that the Transfer Act violated constitutional separation of powers principles. In response to this Court's decision, Congress amended the Act in several respects in 1991. The court of appeals has now held that the Act as amended remains unconstitutional.

1. The 1986 Transfer Act provided for the federal government to lease National Airport and Dulles International Airport to the Metropolitan Washington Airports Authority (Authority), an independent regional authority created through a compact between Virginia and the District of Columbia. The Act conditioned the leases on the creation of a nine-member Board of Review. The Act originally provided for the Board to consist of Members of Congress, all but one of whom were to be members of congressional committees responsible for air transportation matters. 49 U.S.C. App. 2456(f)(1) (1988). The Act required the Authority to submit to the Board a number of significant operational decisions, such as the adoption of an annual budget and any change in hours of operation. 49 U.S.C. App. 2456(f)(4)(A) and (B), 2456(g) (1988). If the Board disapproved any of the proposed actions, the Authority was prohibited from carrying it out. 49 U.S.C. App. 2456(f)(4)(D) (1988).

In *CAAN*, a civic organization and two individuals brought suit against the Authority, contending that the Transfer Act's provisions relating to the Board of Review were unconstitutional. This Court agreed. 501 U.S. at 265-277.

The Court first considered the contention that the Board "neither exercises federal power nor acts as an agent of Congress" (501 U.S. at 265), and hence that the Board's role did not implicate separation of powers principles at all. Based on its review of "the origin and structure of the Board" (*ibid.*), the Court rejected that argument. It observed that the federal government "has a strong and continuing interest in the efficient operation of the airports, which are vital to the smooth conduct of Government business, especially to the work of Congress." *Id.* at 266. Indeed, the decision to create the Board of Review, whose structure and powers Congress mandated in detail, was prompted by Congress's recognition of this federal interest. *Ibid.* Not only did Congress require the creation of the Board as a condition of the airport leases, but it included in the Transfer Act a so-called "drop-dead" clause, under which the Authority would "have no authority to perform any of the actions" subject to Board review if the Board itself were invalidated by a court. 49 U.S.C. App. 2456(h) (1988). Finally, membership on the Board was limited to federal officials, specifically Members of Congress. 501 U.S. at 266-267.

Although the Transfer Act provided that the members of the Board were to serve "in their individual capacities, as representatives of users" of the airports, 49 U.S.C. App. 2456(f)(1) (1988), the Court concluded that the Board nonetheless remained "a congressional agent exercising federal authority." 501 U.S. at 267. The Court noted that the Act did not require Board members to be users of the airports, but instead required them to be members of congressional committees having jurisdiction over transportation issues. *Ibid.* Moreover, Congress "also exercise[d] substantial power over the appointment and removal" of Board members. *Id.* at 268. Although the

Board's members were appointed by the Authority, all appointments were required to come from lists provided by the Speaker of the House of Representatives and the President *pro tempore* of the Senate. 49 U.S.C. App. 2456(f)(1) (1988). "Significantly, appointments *must* be made from the lists, and there is no requirement that the lists contain more recommendations than the number of Board openings." 501 U.S. at 268. If displeased with the performance of members of the Board, moreover, the congressional leadership could remove them from the Board by changing their committee assignments. *Id.* at 269. The Court summarized (*ibid.*):

> We thus confront an entity created at the initiative of Congress, the powers of which Congress has delineated, the purpose of which is to protect an acknowledged federal interest, and membership in which is restricted to congressional officials. Such an entity necessarily exercises sufficient federal power as an agent of Congress to mandate separation-of-powers scrutiny.

After concluding that the Board was acting as an agent of Congress, the Court turned to the limitations imposed by separation of powers principles. 501 U.S. at 271-277. The Court identified two "basic and related constraints." *Id.* at 274. First, Congress may not exercise executive or judicial power at all; second, Congress may exercise legislative power only through the procedures specified in Article I. *Ibid.* The Court concluded that the role of the Board of Review necessarily offended one or the other of those constraints. If the power exercised by the Board was executive, "the Constitution does not permit an agent of Congress to exercise it." *Id.* at 276. If, on the other hand, the Board's power was viewed as legislative, "Congress must exercise it in conformity

with the bicameralism and presentment requirements" of Article I. *Ibid.* The Court therefore found it unnecessary to decide whether the Board's role was executive or legislative; in either case, the Court concluded, the Board's power would be "constitutionally impermissible." *Ibid.*

2. In response to this Court's decision in *CAAN*, Congress enacted the Metropolitan Washington Airports Act Amendments of 1991, Pub. L. No. 102-240, Tit. VII, 105 Stat. 2197 (1991 Amendments) (Pet. App. 69a-79a). The 1991 Amendments preserve the Board of Review, and the Authority remains subject to the "drop-dead" provision (see page 3, *supra*) if the Board is invalidated. In several respects, however, the 1991 Amendments altered the provisions of the Transfer Act relating to the Board.

The first change concerns the composition of the Board. The basic process of appointing Board members is unchanged: The Authority still must select members from lists prepared by the Speaker of the House of Representatives and the President *pro tempore* of the Senate, and the lists need not contain more names than the number of vacancies. 49 U.S.C. App. 2456(f)(1) (Supp. IV 1992). However, the 1991 Amendments eliminated the requirement that Board members be Members of Congress, substituting three new membership criteria. First, members must "have experience in aviation matters and in addressing the needs of airport users"; second, they must be "frequent users" of National and Dulles Airports; finally, they must be registered voters of a State other than Maryland, Virginia, or the District of Columbia. 49 U.S.C. App. 2456(f)(2)(C) (Supp. IV 1992). Of the nine members appointed to the Board on the basis of those criteria following the 1991 Amendments, all but one were Members of Congress who served on

committees having jurisdiction over air transportation. Pet. App. 8a, 217a-218a.

The Board continues to oversee major operational decisions by the Authority, but the 1991 Amendments changed the process by which the Board's oversight role is exercised. In place of the veto power struck down in *CAAN*, the 1991 Amendments substituted a two-stage review process. At the first stage, the Authority must submit to the Board the same kinds of proposed actions that were subject to the Board's veto power under the original Act, along with several additional categories of actions added by the 1991 Amendments. See 49 U.S.C. App. 2456(f)(4)(B) (Supp. IV 1992). The Board is given 30 calendar days or ten legislative days, whichever is longer, to make "recommendations" to the Authority regarding proposed actions. 49 U.S.C. App. 2456(f)(4)(C) (Supp. IV 1992).

If the Authority accepts a Board recommendation, or if the Board makes no recommendation, the proposed action may go into effect immediately. However, if the Authority does not adopt the Board's recommendation, the proposed action is subject to a second stage of review: The Authority must submit to Congress a detailed description of the proposed action, the Board's recommendation, and the Authority's response. 49 U.S.C. App. 2456(f)(4)(D) (Supp. IV 1992). Congress is then given 60 legislative days to consider whether to enact a joint resolution of disapproval, and the Authority must defer the proposed action until the end of that period. 49 U.S.C. App. 2456(f)(4)(D)(ii) (Supp. IV 1992). In practice, a period of 60 legislative days lasts at least three months and may extend for as long as six months. Pet. App. 220a.

3. The plaintiffs in *CAAN* again brought suit to challenge the constitutionality of the Transfer Act, as amended. Respondents argued, *inter alia*, that the 1991

Amendments did not cure the constitutional deficiencies identified by this Court in *CAAN*. The district court entered summary judgment in favor of respondents, holding that the amended Transfer Act violates separation of powers principles, and that the Act's procedures for selecting Board members violate the Appointments Clause. Pet. App. 22a-38a.

The court of appeals affirmed on separation of powers grounds and did not reach the other constitutional issues presented by the case. Pet. App. 1a-19a.[1] The court first addressed the question whether, in light of the 1991 Amendments, the Board remains an agent of Congress. *Id.* at 6a-10a. The court noted that "[t]he new Board and its powers continue to be the creation of Congress, the drop-dead provision remains in place, and the federal interest in the efficient operation of the two airports continues unchanged." *Id.* at 7a. The court acknowledged that the 1991 Amendments had eliminated the explicit requirement that the Board consist of Members of Congress, but it concluded that Congress still "intended the Board to serve, and * * * it does serve, as [Congress's] agent." *Id.* at 10a.

The court reasoned that, "as a practical matter, relatively few individuals other than members or alumni of th[e] [congressional transportation] committees will

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[1] Pursuant to 28 U.S.C. 2403(a), the United States intervened in the court of appeals to address the constitutionality of the amended Act. In *CAAN*, the United States had argued that the original Act was constitutional on the theory that "the Board of Review exercises state, and not federal, power," U.S. Br. at 12 (No. 90-906), and that the Members of Congress designated to serve "in their individual capacities" had "special and distinct individual concerns that justify that designation," *id.* at 13. In light of this Court's decision in *CAAN*, the United States argued in the court of appeals that the amended Act is unconstitutional.

be able to meet" the membership requirements established by the 1991 Amendments. Pet. App. 8a. The court also found it telling that the time limits for Board action were framed in terms of "legislative days," which "exclu[ded] * * * days on which Representatives and Senators may be expected to be out of town." *Id.* at 9a. Finally, the court noted that Congress retained effective control of the composition of the Board through its ability to nominate members and to confine the Authority to the lists of nominees submitted by the Speaker of the House of Representatives and the President *pro tempore* of the Senate. *Id.* at 9a-10a.

After concluding that the Board remains an agent of Congress, the court of appeals turned to the question whether the Board exercises federal power. Pet. App. 10a-19a. Petitioners argued that the elimination of the Board's veto power effectively confined the Board to a purely advisory role of the sort in which Congress or its agents may engage without offending separation of powers principles. *Id.* at 10a. The court of appeals concluded, however, that, under the 1991 Amendments, the Board retains "the power to coerce the Airports Authority to comply with any recommendation." *Id.* at 17a (internal quotation marks omitted).

Although the court of appeals identified several features of the 1991 Amendments in support of this conclusion, it emphasized that "[w]hat tips the balance * * * is the Board's power to delay and perhaps overturn critical decisions [of the Authority] by requiring their referral to Congress." Pet. App. 17a. The court pointed out that the protracted statutory waiting period would pose potentially intolerable costs on the Authority if it refused to accede to the Board's recommendations. *Id.* at 15a, 17a. The impact of delay is especially acute, the court noted, because many of the decisions that are

subject to review by the Board are highly time-sensitive, so that delay "can result in millions of dollars of additional costs and can adversely affect the public safety." *Id.* at 15a. As a result, "[t]he mere existence of this power to delay provides the [Authority] with an enormous incentive to avoid confrontations by tailoring their decisions to suit the Board's pleasure." *Id.* at 18a.

Petitioners argued that the review mechanisms in the 1991 Amendments, including congressional review of the Authority's decisions not to adopt Board recommendations, are simply a variation on conventional "report-and-wait" statutes, under which agencies are required to report proposed actions to Congress and defer implementation pending congressional consideration of a joint resolution of disapproval. Pet. App. 12a. The court of appeals pointed out, however, that conventional report-and-wait statutes provide for automatic referral of specified agency decisions to Congress, and thus have a neutral effect on agency decisionmaking. *Ibid.* In contrast, the 1991 Amendments leave an agent of Congress with discretion whether to trigger the congressional review process, and that discretion provides an avenue for congressional leverage that is not provided by ordinary report-and-wait statutes. *Ibid.*

DISCUSSION

The court of appeals correctly held that the Transfer Act, as amended, violates constitutional separation of powers principles. We nevertheless believe that the petition for a writ of certiorari should be granted. Although the court of appeals' holding follows logically from this Court's decision in *CAAN*, we cannot say that the changes effected by the 1991 Amendments are so clearly without constitutional significance as to rebut the weighty presumption that a court of appeals' decision

invalidating an Act of Congress should be reviewed by this Court.

1. The threshold issue, here as in *CAAN*, is whether the Board of Review "exercises * * * federal power as an agent of Congress," 501 U.S. at 269, thereby subjecting it to the limitations imposed on Congress by separation of powers principles and Article I. Petitioners do not appear to dispute that any power exercised by the Board is that of the federal government.[2] Instead, they challenge the court of appeals' conclusion that the Board acts as an agent of Congress. Pet. 21-28. Petitioners' arguments on this score are without merit.

Petitioners place primary reliance on the fact that the Transfer Act, as amended, no longer limits Board membership to Members of Congress. Pet. 22-23. But as the court of appeals pointed out, the new membership criteria have proved effective in preserving dominant congressional representation on the Board. However "neutral" (Pet. 23) the criteria may appear in the abstract, the court of appeals was correct in concluding that the statutory qualifications will be met by "relatively few individuals other than members or alumni" of congressional air transportation committees. Pet. App. 8a. Moreover, Congress retains control over the actual composition of the Board by requiring the Authority to select Board members from lists prepared by the Speaker of the House of Representatives and the President *pro tempore* of the Senate. Viewed in combi-

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[2] Petitioners do argue that the Board lacks any "power" at all for separation of powers purposes. Pet. 14-21. We address that argument below. See pages 13-17, *infra*. Petitioners do not appear to dispute that, if the Board exercises power in a constitutionally significant sense, the power is that of the federal government.

nation, the membership criteria and the selection process reflect a continuing effort by Congress to use the Board as a vehicle for congressional influence on the Authority's decisions.

Petitioners argue that Congress is free to establish an appointment process in which appointments are made from lists prepared by Congress. Pet. 24-25. That argument is difficult to square with *INS* v. *Chadha*, 462 U.S. 919 (1983). There, this Court held that congressional "action that ha[s] the purpose and effect of altering the legal rights, duties, and relations of persons * * * outside the Legislative Branch," *id.* at 952, can be taken (subject to the exceptions enumerated in the Constitution) only through the passage of a law, see *id.* at 956-957. Congress's formulation and transmittal of lists of acceptable Board members appears to be such an action, because the Authority (which is outside the Legislative Branch) is barred from selecting as a Board member any person not on the lists.

The court of appeals did not, however, rely solely on the requirement that appointees be drawn from congressional lists to determine the Board's membership is unconstitutional. It simply held that Congress's insistence on controlling the membership of the Board through the use of lists, when combined with the indicia present in *CAAN* and membership criteria that are tilted in favor of Members of Congress, indicated that Congress continues to view the Board as its agent.

Finally, petitioners assert that "the dispositive factor" in characterizing the relationship between the Board and Congress is the presence or absence of the removal power, and that the 1991 Amendments therefore break the link between the Board and Congress by eliminating Congress's removal authority. Pet. 26-27. But there is no reason in law or logic why this should be

so. To be sure, removal power may be a significant tool for ensuring that an agent carries out his principal's wishes.[3] But it is hardly the only tool for doing so. Here, the membership criteria and the selection process combine to make it likely that, even in the absence of a formal removal power, the Board will reflect Congress's underlying interests and wishes.[4]

In challenging the court of appeals' conclusion about the status and role of the Board, petitioners assess each component of the statutory scheme in isolation, trying to show that no single component is sufficient to establish the Board as an agent of Congress. The teaching of *CAAN*, however, is that an assessment of the Board's status and role also requires attention to the cumulative effect of the statutory scheme. See 501 U.S. at 266 ("[s]everal factors combine" to subject Board to separation of powers review). When the components of the amended Transfer Act are viewed cumulatively, rather

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[3] At the same time, the existence of removal power may be more theoretical than real. The original Transfer Act did not provide a direct mechanism for Congress to remove Board members. Instead, Congress could accomplish that result by stripping members of the committee assignments required by the Act as a condition for Board membership. Although the Act therefore theoretically vested Congress with the power of removal (*CAAN*, 501 U.S. at 269), removing Board members by unilaterally changing committee assignments was, at best, an extremely unwieldy method of exercising control. The elimination of this mechanism by the 1991 Amendments is unlikely to alter the practical relationship between Congress and the Board.

[4] Petitioners point to the line of cases from *Myers* v. *United States*, 272 U.S. 52 (1926), to *Bowsher* v. *Synar*, 478 U.S. 714 (1986), that addresses the scope of the President's power under Article II to remove executive officers. Pet. 26-27. But those decisions do not hold, as petitioners suggest, that the presence or absence of removal power determines the status of an official.

than in isolation, the conclusion that Congress is continuing to employ the Board as its agent is apparent.

2. *CAAN* holds that Congress may not exercise executive power over the Authority at all, and may not exercise legislative power over the Authority except through the lawmaking procedures mandated by Article I. 501 U.S. at 276. Petitioners argue that, even if the Board is an agent of Congress, the elimination of the Board's veto power renders those constitutional restrictions inapplicable. Pet. 14-21. Petitioners argue that the 1991 Amendments transformed the Board into a purely advisory body, and that separation of powers principles impose no limitations on Congress's ability to offer advice, either directly or through an agent, to the Authority.

The court of appeals correctly rejected that argument. See Pet. App. 10a-19a. By giving the Board discretionary power to trigger congressional review of the Authority's major decisions, and by requiring the Authority to defer action for as long as six calendar months (see page 6, *supra*) if it is unwilling to abide by the Board's wishes, Congress effectively gave the Board the power to control the Authority's principal operational decisions. Given the time-sensitive nature of matters like the adoption of an annual budget (49 U.S.C. App. 2456(f)(4)(B)(i) (Supp. IV 1992)) or the authorization of bonds (49 U.S.C. App. 2456(f)(4)(B)(ii) (Supp. IV 1992)), the Board's power of delay effectively compels the Authority to accede to the Board's wishes.

Petitioners argue at length that the Constitution permits Congress to engage in "advice" and "influence" without resorting to the lawmaking procedures of Article I (Pet. 14-16), and that the court of appeals "has adopted the position that an agent of Congress may not play even an informational or advisory role in the

decisionmaking process of an executive body" (Pet. 21). But the court of appeals held nothing of the sort. To the contrary, the court expressly acknowledged and accepted "the difference between [legislative] persuasion and coercion." Pet. App. 16a. It concluded that the amended Transfer Act crosses the line from persuasion to coercion, by allowing an agent of Congress to impose potentially extended and costly delays on major decisions of the Authority if the agent disagrees with those decisions. *Id.* at 17a (amended Act "gives the Board of Review the power to coerce the Airports Authority to comply with any recommendation") (internal quotation marks omitted).

Petitioners also assert that the two-stage review mechanism created by the 1991 Amendments is constitutionally indistinguishable from "report-and-wait" statutes, whose propriety is well established. Pet. 15-16; see, *e.g.*, *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 689-690 & n.12 (1987); *Chadha*, 462 U.S. at 935 n.9. That contention is without merit. Under "report-and-wait" statutes, the category of agency actions whose implementation is delayed is defined by the statute itself. Such statutes are consistent with the principle that congressional actions "altering the legal rights, duties, and relations of persons * * * outside the Legislative Branch," *Chadha*, 462 U.S. at 952, must be effected through the passage of legislation. Under the amended Transfer Act, by contrast, an agent of Congress determines which of the Authority's actions will and will not be subject to delay, thus permitting Congress to alter legal rights and duties without complying with the bicameralism and presentment requirements of Article I.

As the court of appeals pointed out (Pet. App. 12a), moreover, this distinction has significant practical

effects. Report-and-wait statutes do not affect the outcome of administrative decisionmaking, because they require specified categories of administrative decisions to be presented for congressional review automatically, without regard to the specific outcome of those decisions. But the amended Transfer Act, by giving an agent of Congress discretion to trigger congressional review on a case-by-case basis, reserves the congressional review process for decisions with which the Board disagrees. If the Authority yields to the Board's views, it may act immediately; if it resists, it must wait a potentially prohibitive length of time. The Act thus gives the Board, as Congress's agent, a form of control over the actual content of the Authority's decisions that is qualitatively different from that created by report-and-wait statutes.

Finally, petitioners argue (Pet. 17-20) that the decision of the court of appeals conflicts with *Ameron, Inc.* v. *United States Army Corps of Engineers*, 809 F.2d 979 (3d Cir. 1986), cert. dismissed on motion of parties, 488 U.S. 918 (1988), and *Lear Siegler, Inc.* v. *Lehman*, 842 F.2d 1102 (1988), withdrawn in part on other grounds, 893 F.2d 205 (9th Cir. 1989) (en banc). Under the statute upheld in *Ameron* and *Lear Siegler*—the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. 3551 *et seq.*—if a disappointed government contract bidder files a protest with the Comptroller General, the award of the protested contract is automatically stayed pending an investigation by the Comptroller General. The Comptroller General can take up to 90 days to complete his investigation, but he can lift the stay earlier if he finds the protest frivolous or facially invalid. The CICA expressly allows the procuring agency to override the stay, regardless of the status of the Comptroller General's investigation, if the agency determines that

"urgent and compelling circumstances" require a prompt award. See Pet. App. 13a (describing the CICA).

As explained in the briefs for the petitioner in this Court in *Ameron*, we disagree with the holdings in *Ameron* and *Lear Siegler* that the challenged provisions of the CICA are constitutional, since they give an agent of Congress (the Comptroller General) the power to control the timing of a contract entered into by an Executive agency. Moreover, as the court of appeals explained (Pet App. 13a-15a), the statutory provisions at issue here are distinguishable because the amended Transfer Act vests the Board with significantly greater control over the Authority than the CICA gives the Comptroller General over procuring agencies. See Pet. App. 14a-15a. First, the Board is not dependent on requests from non-governmental third parties to trigger its review powers; it may review on its own initiative any of the decisions specified in the amended Transfer Act. Second, the amended Transfer Act does not permit the Authority to override the Board by pretermitting the review process. If the Authority disagrees with the Board's recommendations, it must wait until the lengthy process of congressional review has run its course, even if (as often will be the case) the resulting delay will effectively block the proposed action.

Petitioners attempt to minimize the differences between the two statutory schemes (Pet. 20), but their efforts are unavailing. It is hardly "irrelevant" to the scope of the Board's authority (*ibid.*) that the Board is free to act on its own initiative rather than being dependent on a request from a private party. And while the amended Transfer Act unquestionably does "specify precisely the areas subject to review and recommendation" (*ibid.*), the decisions that it specifies are the most important ones that the Authority can make, and

they are highly time-sensitive as well. Thus, the fact that Congress has "limited" the Board's oversight to matters such as annual budgets, bonding decisions, and hours of airport operations hardly provides the kind of safety valve contained in the stay override provision of the CICA.

3. Although we agree with the court of appeals that the role of the Board of Review under the amended Transfer Act is unconstitutional, we believe that the petition for a writ of certiorari should be granted. Invalidating an Act of Congress on constitutional grounds is "the gravest and most delicate duty that [a court] is called on to perform," *Blodgett* v. *Holden*, 275 U.S. 142, 147-148 (1927) (Holmes, J.), and when a lower court finds it necessary to perform that duty, review by this Court is ordinarily called for. Although we believe that the 1991 Amendments to the Transfer Act fail to cure the defects identified in *CAAN* and to render the Act constitutional, we do not believe that the inadequacy of the Amendments is so clearly beyond dispute as to eliminate the need for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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REPLY BRIEF FOR PETITIONERS

Petitioners hereby reply to the Opposition Brief filed by respondents John W. Hechinger, *et al.*[1] At the most fundamental level, respondents fail to refute petitioners' arguments for granting a writ of certiorari; nor do respondents suggest any material reason for denying certiorari here.[2] While petitioners agree with intervenor United

[1] As used herein, "App." refers to the appendix accompanying the Petition (dated November 22, 1994).

[2] Significantly, the Opposition Brief devotes extensive discussion to the legislative history of the now superseded Metropolitan Washington Airports Act of 1986, App. at 42a ("Transfer Act"). The relevant question today is whether the new statute as enacted in 1991 passes constitutional muster. Whatever relevance the 1991 legislative history may have in analyzing the 1991 Amendments to the Transfer Act, it is clear that the history of the repealed sections of the 1986 Act is irrelevant.

States that certiorari should be granted and that this case should be scheduled for briefing and argument, petitioners strongly disagree with the United States' lengthy discussion of the merits. Although it is neither necessary nor appropriate to respond to all of the United States' merits arguments at this stage of the proceedings, petitioners note that these arguments dramatically demonstrate that the issues presented in this case are, as the United States concedes, certworthy and of "constitutional significance," Brief for the United States at 9, 17 ("U.S. Brief"), raising new issues not addressed in *Metropolitan Washington Airports Auth. v. Citizens For Abatement of Aircraft Noise*, 501 U.S. 252 (1991) ("*CAAN*"), or any precedent of this Court.

1. Respondents repeatedly characterize the 1991 Amendments to the Transfer Act, App. at 69a ("1991 Amendments"), as superficial or "cosmetic." *See* Opposition Brief at 1, 8, 17 (hereinafter "Opp. Br."). But the court below explicitly recognized that the 1991 Amendments "effected major changes in the composition and powers of the Board," and "*eliminate*[*d*]" the unconstitutional provisions of the original Transfer Act. *Hechinger v. Metropolitan Washington Airports Auth.*, 36 F.3d 97, 98 (D.C. Cir. 1994); App. at 3a, 2a (emphasis added). It is simply disingenuous for respondents to suggest that measures such as removal of the Board's veto power, removal of Congress' power to revoke appointments, and repeal of the requirement that members of the Board be Members of Congress are merely "cosmetic." In fact, the court below specifically based its holding on *new* provisions in the 1991 Amendments relating to completely different qualifications for Board membership and much more limited oversight powers of the Board. *Id.* at 98; App. at 2a. Thus, the court below acknowledged that these provisions raised new constitutional issues not addressed in *CAAN* and never reviewed by this Court. *Id.*; App. at 2a.

2. Respondents erroneously contend that when drafting the 1991 Amendments, Congress did not seriously

consider—and did not intend to consider—constitutional questions. Opp. Br. at 7-8. Yet respondents themselves cite legislative history demonstrating that Congress believed "[a] solution must be found that will provide a *constitutional* mechanism for congressional participation in the authority's decision-making process." Opp. Br. at 7 (quoting *Amendments to the Metropolitan Washington Airports Authority Act of 1986*, 102d Cong., 1st Sess. 36 (1991) (statement of Rep. Payne) (emphasis added) ("*1991 Hearing*")). The record shows that constitutional experts submitted lengthy and sophisticated statements and memoranda describing various ways in which the Transfer Act might be amended to cure the constitutional deficiencies identified by this Court. *See 1991 Hearing* at 200-11; 137 Cong. Rec. H10347-50 (daily ed. Nov. 18, 1991). Significantly, Members of Congress asked these experts a series of probing questions about their opinions. *See 1991 Hearing* at 138-49. Ultimately, Congress relied upon these experts' extensive analyses to conclude specifically that "[t]his legislation will stand the test of constitutionality." 137 Cong. Rec. H10347 (statement of Rep. Oberstar). This Court has recognized "Congress' institutional competence as the National Legislature" to interpret the Constitution, *see Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 563 (1990), and has further recognized that, "[t]he Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). These principles clearly support the granting of a writ of certiorari here, where Congress conscientiously considered the constitutionality of legislation that a lower court has now held unconstitutional. The United States supports this position. *See* U.S. Brief at 9, 10, 17.

3. Citing differences in the relevant statutes (1991 Amendments versus Competition in Contracting Act), respondents claim that there is no conflict between the decision below and the decisions of the Third and Ninth

Circuits in *Ameron, Inc. v. United States Army Corps of Eng'rs*, 809 F.2d 979 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1988), and *Lear Siegler, Inc., Energy Products Div. v. Lehman*, 842 F.2d 1102 (9th Cir. 1988), *irrelevant portion withdrawn en banc*, 893 F.2d 205 (9th Cir. 1989). But the differences cited by respondents ignore the fundamental point. Both *Ameron* and *Lear Siegler* hold that a federal statute does not violate separation of powers principles unless it allows Congress (or one of its agents) to exercise ultimate control over an agency's decisions absent passage of legislation. *See Lear Siegler*, 842 F.2d at 1108; *Ameron*, 809 F.2d at 986. In direct contrast to the holdings in those cases, the court below held that separation of powers principles may be violated where an agent of Congress merely has the power to influence the timing of an agency's decisions. *See Hechinger*, 36 F.3d at 105; App. at 18a. This important distinction, which clearly has led to a split among the circuits, has not been addressed by this Court.[3] Significantly, this Court granted certiorari in a case that involved the control versus influence question, but that case was dismissed on jurisdictional grounds. *See Federal Election Comm'n v. NRA Political Victory Fund*, 1994 U.S. LEXIS 8790 (1994).

4. Respondents incorrectly assert that the lists provided by the Speaker of the House of Representatives and the President *pro tempore* of the Senate are not advisory. Opp. Br. at 9. The statute plainly states that the names on the lists are "recommendations." 49 U.S.C. App. § 2456(f)(1); App. at 95a. Furthermore, the lists of recommendations are not exhaustive; the statute specifically allows the Authority to request additional names if

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[3] The United States argues that *Ameron* and *Lear Siegler* were incorrectly decided, *see* U.S. Brief at 16, thus implicitly acknowledging a split between the court below and the Third and Ninth Circuits on this issue. Nonetheless, the Government unsuccessfully attempts to distinguish those two cases in minor aspects, much as respondents do. *See* U.S. Brief at 16-17.

it is unsatisfied with the suggested names. *Id.* The plain language of the statute thus demonstrates that Congress does not control, much less carry out, the appointment of Board of Review members.

Even though the 1991 Amendments expressly empower the Airports Authority to appoint and remove Board of Review members, the Government persists in arguing that the Board of Review is a congressional agent because Congress sends up lists of recommended appointments and has delineated by statute qualifications for office. *See* U.S. Brief at 10. This surprising departure from the United States' longstanding positions on this issue is unwarranted. *See, e.g.*, 4 Op. Att'y Gen. 162, 164-65 (1843) (recognizing that provisions regarding appointments should be read to preserve constitutionality, Congress may require Secretary of Treasury to appoint permanent inspectors from nominations received from collectors who are not constitutionally empowered to make such appointments); Petitioners' Brief at 24 n.13 (*citing* 29 Op. Att'y Gen. 254, 256 (1911)); *see also* Brief of United States as *Amicus Curiae* at 18 n.12, *Federal Election Comm'n v. NRA Political Victory Fund*, 1994 U.S. LEXIS 8790 (1994) (No. 93-1151) (agreeing with court of appeals that respondents "lack standing" to challenge constitutionality of statutory requirement that Commission have bipartisan membership because it "is difficult, if not impossible to determine" whether such requirements "actually served to limit" the appointer's choices). Certiorari is warranted to clarify Congress' constitutional power, long recognized by this Court, *see, e.g., Myers v. United States*, 272 U.S. 52, 128-29 (1926), to establish procedures and qualifications for appointment to public office.

5. Contrary to the United States' characterization, *see* U.S. Brief at 10, petitioners strongly dispute that any power exercised by the Board is that of the federal government. *See* Petitioners' Brief at 19 n.10. In *CAAN*, this Court held that the Board of Review "exercises suffi-

cient federal power *as an agent of Congress* to mandate separation of powers scrutiny." *CAAN*, 501 U.S. at 269 (emphasis added). However, the 1991 Amendments altered the Transfer Act such that the new Board of Review is no longer restricted to congressional officials and is appointed and removed by the Authority under interstate compact law. That Board is no longer an agent of Congress but rather exercises power derived solely from an interstate compact agency.[4]

6. The United States suggests that the Board must be considered an agent of Congress if it is likely to "reflect Congress's underlying interests and wishes." *See* U.S. Brief at 12. This argument leads to the odd result that anyone who agrees with Congress must be considered an agent of Congress. In any event, the United States further argues that because Congress plays a recommendatory role in the nomination of candidates for the Board of Review, Board of Review members are likely to reflect Congress' underlying interests and wishes.[5] *Id.* Using

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[4] While the Board of Review may remain an entity created "at the initiative" or suggestion of Congress, this factor, by itself, is insufficient to render the Board an agent of Congress. *See Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

[5] The United States asserts that the criteria for membership on the Board of Review "are tilted in favor of Members of Congress, indicat[ing] that Congress continues to view the Board as its agent." *See* U.S. Brief at 11. But the criteria for membership on the Board of Review are neutral, and indeed were enacted in direct response to this Court's holding in *CAAN*. *See* Petitioners' Brief at 23-24. Many people other than sitting Congresspersons are eligible for membership on the Board of Review, as is evidenced by the membership of Drew Lewis, former Secretary of Transportation, and, as of January 3, 1995, by the membership of four individuals who are no longer Members of Congress. Indeed, a majority of the present Board of Review members are not Members of Congress. Examples of other potential candidates for membership on the Board of Review include most present and former state governors and transportation officials, former cabinet and subcabinet officers, academics, representatives of aviation concerns, former federal

such reasoning, however, each of the Justices of this Court would be considered agents of the Executive and subject to the Executive's will, because each was nominated by the Executive. Contrary to the test proposed by the United States, the true test of whether an entity is an agent of Congress is whether Congress can control that entity if it acts contrary to Congress' interests and wishes. *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986) (discussing officer under Congress' control and noting that desire to avoid removal by pleasing Congress creates "here-and-now subservience" to that branch). Under the 1991 Amendments, Congress no longer possesses any means of controlling members of the Board of Review. *See* 49 U.S.C. App. § 2456(f)(11); App. at 105a.

7. Respondents incorrectly assert that the Board of Review is unconstitutional because its members are not appointed in accordance with the Appointments Clause. *See* Opp. Br. at 20. The Appointments Clause applies only to Officers of the United States who exercise significant authority pursuant to the laws of the United States. *See Buckley v. Valeo*, 424 U.S. 1, 124-26 (1976). Members of the Board of Review are not federal officers, but instead are officers of an interstate authority which was created pursuant to an interstate compact between Virginia and the District of Columbia.[6] Similarly, Board of

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judges and former Congresspersons—categories which include a large number of potential nominees.

[6] Ironically, respondents argue that members of the Board of Review are agents of Congress rather than members of the executive branch. If members of the Board of Review are agents of Congress (a fact which petitioners strongly dispute), then they are not subject to the Appointments Clause in any event. *See Buckley*, 424 U.S. at 128 ("[N]othing in our holding with respect to Art. II, § 2, cl. 2, will deny to Congress 'all power to appoint its own inferior officers to carry out appropriate legislative functions.' "). Even if the Board of Review were an agent of Congress, pursuant to the 1991 Amendments, it exercises only powers that Congress could have delegated to one of its own committees. *Id.* at 137.

Review members do not exercise authority pursuant to the laws of the United States. Under the 1991 Amendments, the Board of Review advises the Authority but does not control the Authority's actions. Rather, the Board of Review makes recommendations only "in an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not 'Officers of the United States.'" *Id.* at 137-39.

As noted in the Petition, this case involves (1) an Act of Congress held unconstitutional by a lower court despite Congress' careful attention to the constitutional issues presented, (2) a split between the circuits regarding whether mere influence exercised by a purported agent of Congress over a non-congressional agency constitutes a violation of separation of powers principles and (3) significant constitutional issues regarding the ability of Congress to prescribe qualifications and suggest nominees for non-congressional offices. For the foregoing reasons and those previously stated, this Petition for a Writ of Certiorari should be granted, and this case should be scheduled for briefing and argument.

Respectfully submitted,

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